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AN EDITORIAL

THE LEADING ARTICLE in this issue of *The Arbitration Journal* by Judge Samuel H. Hofstadter is an outstanding contribution to the literature of law and arbitration. As a jurist of distinguished reputation, Judge Hofstadter expresses a deep feeling for legal tradition and due process of law but his views have the additional merit of awareness of the needs of private citizens for means of settling day-to-day disputes in an expeditious manner. Judge Hofstader concludes with a plea for "self-restraint" on the part of courts and for "another hard look at its past attitude toward arbitration" with a view toward "recapturing the confidence of the business community."

Judge Hofstadter finds fault with many judicial constructions which permit parties to evade obligations to arbitrate. It would be unfortunate, however, if his carefully reasoned arguments and accurate documentation gave the impression that all courts, or even most, were hostile to voluntary arbitration. The fact is that progress *is* being made, and at a noticeably increasing rate.

From among the many hundreds of court decisions favorable to arbitration, we cite one which may be taken as typical. On pages 169-70 of *The Arbitration Journal* (Volume 9, No. 3), we reported the decision of Judge Hirt of the Superior Court of Pennsylvania, in the case of *Povey v. Midvale Co.* Here, an employee whose grievance was subject to an arbitration clause, sought to obtain additional compensation as wages through litigation. He denied that he was obliged to arbitrate inasmuch as the 1927 arbitration statute of Pennsylvania specifically excluded labor-management disputes from its coverage. To this assertion, Judge Hirt replied: "Public policy in Pennsylvania has long favored arbitration of disputes even to the extent of outlawing statutes which attempted to abolish it. Plaintiff's claim for additional wages is based on rates of pay fixed by collective bargaining agreement. He cannot be allowed benefits under the favorable provisions of the agreement and refuse to be bound by terms which are to his disadvantage. To nullify the agreement in this case would amount to the denial of the Constitutional right of contracting for the arbitration of grievances relating to a lawful subject which does not involve any question of public policy. Clearly, the answer to plaintiff's contention is that the 1927 Act did not

abrogate common law arbitration; the remedy provided by that Act is cumulative merely and not exclusive."

Subscribers to *The Arbitration Journal* and the Digest of Court Decisions on Arbitration, published by the American Arbitration Association, will recall dozens of other recent cases in which judges agreed with Judge Hofstadter that "neither (the courts) nor the system of law which they administer furnish the only feasible means of adjusting controversy without violence."

AMONG OUR CONTRIBUTORS

SAMUEL H. HOFSTADTER has been Justice of the Supreme Court continuously since 1933, having previously served as assemblyman and state senator in the New York legislature. In his latter capacity, he was chairman of a committee which investigated the administration of New York's government. Judge Hofstadter has written several works in the field of law. His most recent book, "Right of Privacy," published by Grosby Press, is a comprehensive survey of the development of law and practice in an important branch of human rights.

THOMAS A. KNOWLTON has been an active arbitrator of labor-management controversies for many years. He served with the National War Labor Relations Board during World War II, following a teaching career at the University of Maine. His comments on the need for re-examining seniority clauses and arbitration provisions in collective bargaining agreements in view of recent economic trends will strike a responsive note in labor and management circles.

L. J. BLOM-COOPER, a practicing barrister in London, is editor of Notes on Decisions for the International and Comparative Law Quarterly. He has frequently contributed articles and notes on arbitration to British legal periodicals, among them, *The Solicitor.*

THE COURTS AND ARBITRATION†

An Aspect of "Obedience to the Unenforcible"

Samuel H. Hofstadter*
Justice of the New York Supreme Court

Human actions, Lord Moulton tells us, may be divided into three groups: (1) those within the domain of positive law, (2) those within the domain of free choice and (3) those within that vast region between the two which he terms the "unenforcible"—the things a man must impose on himself—duty, good taste and the capacity to discard dubious promptings. The real greatness of a nation, its true civilization, he said, is measured by the extent of its obedience to the unenforcible.[1]

It is common experience that governmental agencies and instrumentalities almost instinctively reach out for power and stubbornly resist any effort to curtail it. It must be admitted in all candor that the courts, too, have at times fallen victim to this tendency. Whatever the reason or motivation for this attitude, it expresses little regard for the restraints of the unenforcible. These, as the very term "unenforcible" denotes, are not coercive, but self-imposed.

Perhaps in no area of human endeavor does the unenforcible come into play more than in the courts which administer the common law. It is axiomatic that under our common law system law is largely judge-made. In the functioning of such a system, however great the influence, or even the binding effect of precedent, the personality and underlying attitudes of the judge still play an important part in decision. Insofar as precedent may be relevant, the interpretation, application and choice of precedents will vary with the par-

† Reprinted, with permission, from the *New York Law Journal,* November 8, 9 and 10, 1954.

* I am deeply indebted to Theodore B. Richter for his close and devoted collaboration in the preparation of this Article. As presented here, it represents our united effort in a cause in which we both strongly believe.

1. H. Fletcher Moulton, Life of Lord Moulton, pp. 96, passim.

ticular judge. One has to read but a few of the opinions of the Supreme Court of the United States or of other appellate courts in cases decided by a closely divided court to realize how obvious this is. Whether the case be the rare specimen which lawyers call one of first impression, or one governed by supposedly controlling authorities, essentially the judicial process operates in the field of the unenforcible. How far have the courts bowed to the unenforcible in dealing with arbitration? It is the writer's firm conviction that the courts, from the outset, fearful of the encroachment of arbitration on their own jurisdiction, harbored a hostility to arbitration which not only has been plain in the decisions before the enactment of modern arbitration statutes, but which still expresses itself despite these statutes.

At common law in England the path of a party to an agreement to arbitrate a future controversy was beset with pitfalls. The agreement could be revoked before an award was made,[2] though, if the party revoking had given a penal bond to abide by the award, recovery of the amount stipulated in the bond was at first allowed.[3] Later, however, by statute, the aggrieved party's right of recovery on the bond was limited to the damages actually suffered by reason of the wrongful revocation, an empty right as a practical matter.[4] The agreement was not specifically enforcible in equity,[5] nor could it be pleaded in bar,[6] nor serve as the basis of a stay of a suit on the original cause of action.[7] Exception was sometimes made when the arbitration agreement was limited in scope, as when it left to judicial determination the general question of liability, and committed to arbitration only the ascertainment of the amount due or of specific facts, and made such limited arbitration a condition precedent to a right of action on the contract.[8] Once an award had been made, an action to enforce it was also maintainable.[9] The reasons given by the

2. Vynior's Case, 8 Co. 80a and 81b (1609); discussion of the common law rule in dissenting opinion of Peterson, J. in Park Const. Co. v. Independent School District No. 32, 209 Minn. 182, 296 N.W. 475 (1941); Cohen, Commercial Arbitration and the Law (1918).
3. Vynior's case, 8 Co. 80a and 81b (1609).
4. Statute of Fines and Penalties (8 & 9 William III, c.11, s.8) (1687); Sayre, Development of Commercial Arbitration Law, 37 Yale L.J. (1927) 595, 604-605.
5. Story, Equity Jurisprudence, 14th Ed. (1918), § 1900, note 1, and cases cited.
6. Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F. 2d 978, 983-984, notes 8a and 20 (2d Cir. 1942).
7. See note 6, supra.
8. Pres. etc. D. & H. Canal Co. v. Pa. Coal Co., 50 N.Y. 250 (1872); Hamilton v. Liverpool, London & Globe Ins. Co., 136 U.S. 242, 255 (1890).
9. Matter of Berkovitz v. Arbib & Houlberg Inc., 230 N.Y. 261, 275 (1921); Curtis v. Gokey, 68 N.Y. 300 (1877).

English courts over the years for their attitude were varied. One often advanced which grew into a formula was that arbitration ousted the courts of their jurisdiction.[10]

It need not be assumed that the ouster of jurisdiction formula was born of selfish or mercenary motives, though it has been asserted that at one period the dependence of the English judges on court revenues for their livelihood colored their views on the question.[11] A worthier reason may well have been paternalistic concern that only in the courts could merchants secure effective redress for their grievances and that they needed the courts to protect them against their own weakness or folly in agreeing to forego judicial determination of their disputes. Even so, this concept of the court as the only forum for the satisfactory resolution of differences bespeaks little obedience to the unenforcible.

In the main the rules laid down by the English courts were accepted as established doctrine by the American courts.[12] As our Court of Appeals said in 1872: "But the rule that a general covenant to submit any differences that may arise in the performance of a contract, or under an executory agreement, is a nullity, is too well established to be now questioned. . . ."[13]

American courts, too, adopted much the same attitude as the English courts had done. "Generally speaking, then, the courts of this country were unfriendly to executory arbitration agreements."[14]

The solicitude for the rights of the parties to arbitration agreements revealed in this attitude is a curious phenomenon. It is not edifying to read in the older reports some almost contemporaneous decisions which, on the one hand, "protect the constitutional right" of men to contract to work unconscionably excessive hours in exhausting occupations and of women to labor for a below subsistence level of wages and, on the other hand, abrogate, as against public policy, the considered and carefully drawn agreements of puissant merchants to arbitrate commercial disputes.

The legal mind can lose itself in conceptual thinking and some-

10. Meacham v. Jamestown, F. & C. R.R. Co., 211 N.Y. 346, 351 (1914); United States Asphalt R. Co. v. Trinidad Lake Pet. Co. Ltd., 222 F. 1006 (1915).
11. Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F. 2d 978, 983 (2d Cir. 1942); Lord Campbell in Scott v. Avery, 25 L.J. [N.S.] Exch. 308, 313.
12. Hurst v. Litchfield, 39 N.Y. 377, 379 (1868).
13. Pres. etc. D. & H. Canal Co. v. Pa. Coal Co., 50 N.Y. 250, 258 (1872).
14. Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F. 2d 978, 984 (2d Cir. 1942).

times a seed of an idea set in the current of the law bears alien fruit! Justice Frankfurter recognized this danger when he recently wrote: "One of the most treacherous tendencies in legal reasoning is the transfer of doctrines which are, in effect, generalizations developed for one set of situations to seemingly analogous yet essentially very different situations.[15]

It must be admitted, however, that American courts, though applying the old doctrine, did, from time to time, criticize or question the reasons which lay behind it.[16] Nor were our courts uniformly antagonistic to the institution of arbitration. Occasionally they even sang its praises as, for example, when the Court of Appeals in affirming a judgment for the plaintiff upon an award, was bold enough to suggest that: "It would be better for the people if more of their controversies would be settled in the same way, and justice would be quite as likely to be done as when administered by the more formal methods of litigation in the courts.[17]

In New York the distinction between agreements to arbitrate future and existing controversies was given statutory recognition at a comparatively early date.[18] The provisions of the Revised Statutes, later carried into the Code of Civil Procedure, permitted the submission of an existing controversy by a duly acknowledged instrument, which could not be revoked after the proofs had been closed and the matter finally submitted for decision. So firmly, however, had the revocability of an arbitration agreement become imbedded in the law, that even this formal submission might otherwise be revoked, though in such case, the party revoking and his sureties were subject to an action for damages.[19]

Such was the law, when in 1920 New York became the pioneer in enacting the first arbitration statute, which radically changed existing law. The new law declared an agreement to arbitrate a future controversy valid, enforcible and irrevocable, except on grounds on which any other contract may be revoked. The law also implemented this declaration with appropriate remedies and at the same time put an end to the privilege of revoking the submission of an

15. Braniff Airways, Inc. v. Nebraska State Board, 347 U.S. 590, 603 (1954); dissenting opinion of Mr. Justice Frankfurter.
16. United States Asphalt R. Co. v. Trinidad Lake Pet. Co., Ltd., 222 F. 1006 (1915); Pres. etc. D. & H. Canal Co. v. Pa. Coal Co., 50 N.Y. 250, 258 (1872).
17. Curtis v. Gokey, 68 N.Y. 300, 305 (1877).
18. Rev. St. (1829); Code of Civil Procedure, Title VIII §§ 2365-2386; Carmody's New York Practice, 2d Ed., § 1058, pp. 1076-1077.
19. Code of Civil Procedure, §§ 2383, 2384.

existing controversy.[20] This law as amended has since been transferred to the Civil Practice Act.[21] In 1925 the Federal Act, modeled on the New York law, was adopted[22] and fairly uniform laws on the same general lines have been enacted in various other states.[23] It is not without interest to note in passing that as late as 1953, in states which had not adopted such laws, one court held that an agreement to arbitrate future disputes may be revoked at any time before the making of the award,[24] and another that such an agreement is invalid "as constituting an attempt to oust legally constituted courts of their jurisdiction."[25]

The impact of the statutes on the development of the law of arbitration can be found only in cases decided after their adoption. Since the movement towards a broader and more enlightened system of arbitration originated in New York, we shall, in the main, confine ourselves to cases in the New York courts. These, it is believed, are generally in line with the decisions of other jurisdictions. From a study of the principal cases in the New York reports there emerges neither a uniform pattern nor a definite trend; indeed, at times it is difficult to reconcile some of the decisions.

Soon after its enactment, the New York arbitration statute of 1920 successfully met a challenge of its constitutionality. In rejecting the contention that its application to arbitration contracts entered into before it took effect impaired the obligation of these contracts and that it deprived the parties of the right to trial by jury, Judge Cardozo, after reviewing the history of arbitration at common law, commented tersely: ". . . For the right to nullify is substituted the duty to enforce."[26] Not long afterwards the Supreme Court of the United States held that the New York Supreme Court could entertain a proceeding, under the New York Arbitration Law, to enforce an arbitration clause in a charter-party, without invading the exclusive jurisdiction of the Federal courts over maritime causes.[27] The Supreme Court ruled also that the Federal statute in giving admiralty courts the power specifically to enforce arbitration agreements, did not encroach

20. Arbitration Law, Laws of 1920, ch. 275 and amendments.
21. Civil Practice Act, Article 84.
22. United States Arbitration Act, 9 U.S.C.A.
23. New Jersey (1923); Massachusetts (1925); Oregon (1925); California (1927); Louisiana (1928); Pennsylvania (1928); Arizona (1929); Connecticut (1929); New Hampshire (1929); Rhode Island (1929); Wisconsin (1931); Ohio (1931); Michigan (1941); Washington (1943).
24. Wilson v. Gregg, 255 P. 2d 517, 520 (Okla. 1953).
25. Fenster v. Makovsky, 67 So. 2d 427 (Fla. 1953).
26. Matter of Berkovitz v. Arbib & Houlberg, Inc., 230 N.Y. 261, 274 (1921).
27. Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924).

on the United States Constitution.[28]

When the new statute laid to rest the doctrine of revocability and the court in the *Berkovitz*[29] opinion cordially welcomed the change, arbitration seemed at last to have come into its own. Resistance to arbitration did not, however, crumble so easily and even today arbitration must still struggle for its rightful place.

Those seeking to escape arbitration commitments argued, as they still do, that the given dispute was beyond the scope of the arbitration clause relied on. In some instances the clause was given so narrow a construction as to make it doubtful whether the expectation of the parties in entering into the arbitration agreement was fulfilled. Thus, in one case, a provision in a building contract for the arbitration of "all questions that may arise under this contract and in the performance of the work thereunder" was held to exclude a dispute arising out of the contractor's claim that he had been damaged by the owner's delay in performance, because the acts complained of were "in violation and in repudiation," not in performance of the contract.[30] In another, the clause provided for arbitration between a manufacturer and the buyer of tractors of "any controversy or difference of opinion . . . as to the construction of the terms and conditions of this contract or as to its performance . . .", and that the decision of the arbitrators should be a "condition precedent to any suit upon or by reason of any such controversy or difference." By a bare majority the court held that though the arbitrators had power to find the manufacturer in default, it was beyond their competence to award the consequent damages of $849,006.76 suffered by the buyer in the ruin of its business.[31] Judge Cardozo, who wrote for the majority and was, in general, certainly not unsympathetic to arbitration, said that in the task of construction: "Our own favor or disfavor of the cause of arbitration is not to count as a factor, in the appraisal of the thought of others."[32] An authoritative writer has said that the cases on this branch of the law of arbitration present "as weird a tale of judicial construction of documents as exists in the history of our law."[33]

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28. Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1932).
29. Matter of Berkovitz v. Arbib & Houlberg, Inc., 230 N.Y. 261, 276 (1921).
30. Matter of Young v. Crescent Development Co., 240 N.Y. 244 (1925); see also Matter of Smith Fireproof Construction Co., Inc. v. Thompson-Starrett Co., 247 N.Y. 277 (1928).
31. Matter of Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284 (1929).
32. See note 30 (p. 299).
33. Phillips, The Paradox in Arbitration Law, 46 Harv. L. Rev. 1258, 1276 (1933).

Perhaps an equally strange story is unfolded in the cases dealing with the question whether parties who have sought to embody in a contract of sale the rules of a trade association have succeeded in incorporating the rule which prescribes arbitration. Soon after the 1920 statute became law, the statement: "Sales are governed by raw silk rules adopted by the Silk Association of America," was held not explicit enough to embrace the arbitration rule. The misstep lay in the failure of the parties to say either that any controversy was to be arbitrated according to the rules or "by appropriate phraseology that the reference to the rules was intended to include those providing for arbitration."[34]

Some years later, however, a like omission from a salesnote was found not fatal to an effective incorporation of the arbitration rule. The clause read: "This Salesnote is subject to the provisions of STANDARD COTTON TEXTILE NOTE which, by this reference, is incorporated as a part of this agreement and together herewith constitutes the entire contract between buyer and seller."[35] Of course, thirty years had gone by since the *Gerseta* case was decided and during this interval resort to arbitration had become much more common. The *Level* decision in 1953 seemed to hold that an incorporation of the rules of a trade association extended to the arbitration rule, without specific mention or reference—a practical and sensible view.

How far the rule of the *Level* case may be regarded as authoritative is now open to question, in the light of a still later decision of the Court of Appeals, rendered in February, 1954. The clause: "This contract is also subject to the Cotton Yarn Rules of 1938, as amended," was held not a sufficiently clear expression of assent to the arbitration rule.[36] Though the rules themselves stated that by the quoted clause they "are incorporated as a part of an agreement and altogether therewith constitutes the entire contract between buyer and seller."—almost *verbatim* the clause in the *Level* case salesnote—the majority of the court found a distinction between the cases. The majority

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34. Matter of General Silk Importing Co. Inc. (Gerseta Corp.), 198 App. Div. 16 (1921); s.c. 200 App. Div. 786 (1922), affd. 234 N.Y. 513 (1922). Curiously enough in Matter of Wenger & Co. v. Propper Silk Hosiery Mills, Inc., 239 N.Y. 199 (1924), where the contract besides containing an express clause for arbitration under the rules of the association, also provided: "Sales governed by Raw Silk Rules & Regulations of the Silk Association of America," the court treated these rules as part of the contract (p. 202).
35. Matter of Level Export Corp. (Wolz, Aiken & Co.), 305 N.Y. 82 (1953).
36. Matter of Riverdale Fabrics Corp. (Tillinghast-Stiles Co.), 306 N.Y. 288 (1954).

opinion in the *Riverdale* case spoke of the "unwary trader," of compelling a party to "surrender his right to resort to the courts, with all their safeguards," and seemed to look upon the Cotton Yarn Rules as purposely drawn to ensnare the unsuspecting businessman into arbitration against his will. The majority said that "parties are not to be led into arbitration unwittingly through subtlety," and intimated that the rules were "designed to avoid any resistance that might arise if arbitration were brought to the attention of the contracting parties. . . ." The three dissenting judges were of the opinion that the *Riverdale* result was contrary to that reached in the *Level* case, and so it seems to the writer. Of greater significance, however, than the actual decision in the *Riverdale* case—for incorporation clauses which will meet the more exacting tests imposed by that decision can be drafted—is the attitude reflected in the majority opinion. Arbitration is, in effect, scorned as something alien, a peril against which a mature businessman buying textiles in the New York market must be guarded as though he were a ward of the court.

The setting in which these contracts incorporating the rules of trade associations are made has apparently been ignored. Ordinarily the parties, if not members of the association, are engaged in the same or allied trade and are entirely familiar with the form of contract in use and with its arbitration clause. They themselves may have participated in arbitrations and they know that arbitration has been conducted in the trade for many years and has become common and accepted practice. In these circumstances seasoned businessmen should be held to their engagements.

The important question whether an agreement to arbitrate future controversies must be signed has been presented in a number of cases. By express statutory provision a submission to arbitrate an existing controversy is void unless both in writing and subscribed by the party to be charged.[37] The same section prescribes that an agreement to arbitrate a controversy thereafter arising must be in writing, but omits the requirement of a signature.[38] This vexed question has now been set at rest by a recent decision of the Court of Appeals which, following intimations of like tenor in the Appellate Division,[39] has held squarely that a contract for the arbitration of a future con-

37. Civil Practice Act, § 1449.
38. Id.
39. Matter of Japan Cotton Trading Co. Ltd. v. Farber, 233 App. Div. 354 (1st Dept. 1931); Matter of Exeter Mfg. Co. v. Marrus, 254 App. Div. 496 (1st Dept. 1938).

troversy, if in writing, is valid and enforcible, though not signed.[40] The court upheld a finding that the buyer, who resisted arbitration, had by retaining, without objection, for several days, the seller's three confirmation forms and by returning one of the three signed by it, agreed to the arbitration clause in the confirmations, though the letter returning the signed confirmation also returned the other two unsigned and stated that the buyer could use only the kind of goods covered by the signed form.

Whether the result reached by a divided court in the Appellate Division in a late case involving the same question accords with this wholesome precedent, is perhaps debatable. After the buyer had signed two contracts containing arbitration clauses, the seller delivered additional goods of like kind, claimed to have been purchased orally under these contracts on the same terms; the invoices for this additional merchandise, retained by the buyer, referred to the written contracts by number and date. The majority of the court held there was no enforcible written contract to arbitrate the dispute as to the additional goods, since the invoices could not be treated as contracts.[41] The case cited in the court's opinion for the non-contractual nature of an invoice[42] held merely that an invoice with an arbitration clause did not supersede a prior written contract from which such clause was absent. It would seem that, under the principle of the *Whiting* case,[43] there was at least a triable issue in the *Talcott* case,[44] whether the parties had in fact agreed on the sale of the additional goods on the terms of the written contracts, and that the buyer's retention of the invoices specifically referring to these contracts bore directly on that issue. Perhaps, too, the informal and even loose way in which businessmen often conclude sales was not given its due weight.

A ruling in another very recent case that, in somewhat analogous circumstances, no substantial issue as to the making of a written contract had been established, deserves mention. In confirmation of a sale concluded by telephone the seller mailed to the buyer its standard form of contract containing an arbitration clause and providing that,

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40. Matter of Helen Whiting, Inc. (Trojan Textile Corp.), 307 N.Y. 360 (1954).
41. Matter of James Talcott, Inc. (Wertheimer), 284 App. Div. 248 (1st Dept. 1954).
42. Matter of Tanenbaum Textile Co. Inc. v. Schlanger, 287 N.Y. 400, 404 (1942).
43. Note 40.
44. Note 41.

if it was not returned signed by return air mail, the seller should have the right to cancel. It was not signed or returned; indeed the buyer denied having received it. The seller, instead of canceling, shipped the goods for which the buyer paid. The seller's application to stay the buyer's action for breach of warranty was denied, as matter of law.[45] The view of the dissenting justice that the facts stated created a triable issue appears the more realistic.

It is established that, if under an unambiguous agreement there has been no default, arbitration may not be ordered[46] and that whether a bona fide dispute exists is a question of law.[47] However desirable this principle, certainly it is one to be applied with the utmost circumspection, lest the court trespass on the domain of the arbitrator and pass on the very controversy which the parties have committed to him. It is questionable whether this restraint was manifested in holding not arbitrable, under a comprehensive arbitration clause, a dispute between buyer and seller, arising from the buyer's contention that the seller had not exercised in good faith his contract right to require cash payments in advance of delivery if, in his "sole opinion," the buyer's responsibility should become impaired or unsatisfactory to the seller and that no forbearance or course of dealings should affect the seller's right so to do.[48] Is not this the very kind of controversy arbitrators are peculiarly fitted to decide and which businessmen, in making their arbitration agreement, intend them to decide?

Nonconformity of an award with legal concepts normally applied in litigation may also result in its frustration. Thus, a collective bargaining agreement between a publishers' association and a union empowered the Adjustment Board, designated therein as the arbitrator, to "impose damages, money or other penalties" upon any party found guilty of a violation of its provisions. The Adjustment Board, having found that the union had violated the clause forbidding strikes, lockouts and work stoppages, awarded the aggrieved association $2,000 actual damages and $5,000 as punitive damages, the latter sum, however, not to become payable unless the Board during the balance of the term of the agreement should find that the union had again vi-

45. Matter of Pavia & Co., Inc. (Fulton County Silk Mills), 284 App. Div. 391 (1st Dept. 1954).
46. Matter of General Electric Co. (United El. Radio & Machine Workers), 300 N.Y. 262 (1949).
47. Matter of Wenger & Co. v. Propper Silk Hosiery Mills, Inc., 239 N.Y. 199, 202-203 (1924).
48. Alpert v. Admiration Knitwear Co. Inc., 304 N.Y. 1 (1952). See also: Matter of Webster v. Van Allen, 217 App. Div. 219 (4th Dept. 1926).

olated this clause. Though this punitive award, unquestionably permitted by the agreement, was obviously an effective deterrent against repetition of the offense, a majority of the court held it invalid and struck it from the award.[49] Why? Because the plaintiff in an action for breach of contract may not recover punitive damages, and contract provisions for penalties, as such, are regarded as against public policy; an arbitrator may not, even with the consent of the parties who have set up a system intended to promote peace in their industry, adopt the very means most likely to insure that peace. This view did not commend itself either to the judge in the lower court,[50] or to the minority of the Appellate Division. The latter aptly noted that:

> "It is just as much the public policy of this State that arbitration awards within the limit of the submission are not to be impeached for misconception of the law. . . ."[51]

and

> ". . . In fact, it would seem to us that the public policy is as much, if not more, concerned with the maintenance of industrial peace as it is with the inflexibility of any judge-made rule of damages in contract actions brought in the courts. . . ."[52]

Conceivably, the court should not lend itself to the enforcement of an award which outrages its sense of justice, offends public morals or runs afoul of the penal law.[53] The award of punitive damages to the publishers' association clearly is not of that kind. Obedience to the unenforcible might well have led to a contrary decision.

On the same day that the Appellate Division decided the *Publishers' Association* case, it handed down a decision in another case in which a punitive award had been made. The rules of the trade association incorporated in the sale contract provided for arbitration and required the defaulting party to pay the difference between the contract price and the market value within ten days after the award determining this difference. They provided further that the "defaulting party shall pay a penalty, as determined by arbitration, of not less than 2% and not more than 10% of the market value established as of the date of the award." Pursuant to the rule, the arbitrators awarded a 2% penalty, amounting to $436.80. The ma-

49. Matter of Publishers' Assn. (Newspaper & Mail Deliverers' Union) 280 App. Div. 500 (1st Dept. 1952).
50. 111 N.Y.S. 2d 725 (1952).
51. See Note 49 (p. 509).
52. See Note 49 (p. 510).
53. See Matter of Western Union Tel. Co. (A.C.A.), 299 N.Y. 177 (1949).

jority of the court upheld the award[54] and the Court of Appeals, also by a bare majority, affirmed without opinion.[55] It is idle to speculate what fate the $5,000 award in the *Publishers' Association* case would have met in the Court of Appeals. A lawyer called on to draw a penalty award clause capable of winning judicial approval faces a challenging task.

The Supreme Court of the United States has held an arbitration clause in a margin agreement between a stock brokerage firm and its customer a waiver of the latter's rights under the Securities Act of 1933, made void by the Act.[56] Because, in the opinion of the majority, "the effectiveness in application" of the Act's provisions advantageous to the security buyer is lessened in arbitration, the court resolved the conflict in policy between the Securities Act and the United States Arbitration Act in favor of the former. Though the underlying assumption that the court is the only forum in which a security buyer can obtain proper redress, which led the majority to treat the statutory right to sue in the courts as something other than a mere method of enforcing his substantial rights under the Act, may not be entirely persuasive, the court, at least, gave effect to what it found to be the paramount legislative intent, rather than to its own view of public policy.[57]

Labor arbitrations have, on the whole, fared neither better nor worse than other arbitrations in our courts. The writer has already reviewed some of the labor arbitration cases in another context.[58] Perhaps when the Court of Appeals said in a recent case: "The failure to allude specifically to every possible area of dispute should not result in making an arbitration clause unworkable where the parties have specifically said that it was their intention to include 'any dispute . . . with reference to any matter not provided for in this Contract.' "[59], it showed its awareness of the indispensability of arbitration

54. Matter of East India Trading Co. Inc. (Halari), 280 App. Div. 420 (1st Dept. 1952).
55. 305 N.Y. 866 (1953).
56. Wilko v. Swan, 346 U.S. 427 (1953).
57. An attorney's compensation allowable under the Federal Emergency Price Control Act has also been held not to be arbitrable. Matter of Kingswood Management Corp. (Salzman), 272 App. Div. 328 (1st Dept. 1947).
58. Labor Arbitration in New York—With a Suggestion for the Establishment of Labor Courts, 130 N.Y.L.J. 472, September 18, 1953.
59. Matter of Bohlinger (National Cash Register Co.), 305 N.Y. 539, 542 (1953). A like sense of actuality is reflected in decisions such as Matter of Adler, Inc. (Local 584, International Brotherhood of Teamsters, etc.), 282 App. Div. 142 (1st Dept. 1953) and Niles-Bement-Pond Co. v. Amalgamated Local 405, 140 Conn. 32, 97 A. 2d 898 (1953).

in some form to the successful operation of a collective bargaining agreement. Indeed, a writer suggests that the unique character of such agreements, creating, as they do, standing machinery for the maintenance of the day-to-day contact between the parties with a minimum of friction, should exempt them from the rules governing arbitration in other fields.[60] Analysis of this interesting thesis is beyond the scope of the present discussion.

No comprehensive survey of the vast literature on arbitration has been attempted here.[61] We have chosen but a few from the myriad of decided cases to illustrate that, though the ouster of jurisdiction formula may have become outmoded, much of its philosophy still persists. We do not urge that arbitration is a panacea. All we say is that it provides an acceptable forum for the resolution of controversy to which men should be free to take their disputes if they see fit to do so. Whether a court can decide them more wisely is beside the point. It is sufficient that arbitration is a time-honored and civilized instrument through which the parties to a dispute can find impartial and disinterested persons to determine it for them. These comments apply strikingly to trade arbitrations, in which the arbitrators are usually fellow members of the very industry in which the dispute arises—the nearest approach to the ancient concept of a jury drawn from the citizenry of the vicinage. Encouragement, not frustration, of such arbitrations should have been the rule.

Very recently, Presiding Justice Peck of the Appellate Division in the First Department had occasion to say: "I suppose the most basic understanding is a realization that the means of the peaceable adjustments of disputes is the basis of any peaceful society."[62] What is vital is that an agency is at hand for the peaceful disposition of conflict, not its particular form. Arbitration is such an agency and, in a primary sense, it is a judicial process. The law itself, Learned Hand has told us, "is no more than the formal expression of that tolerable compromise without which the rule of the claw and tooth must prevail."

Probably, not until force first met equal force on some primitive windy plain did the necessity of an impartial forum protrude itself on man's essential egocentricity. Compelling stalemate then obliged

60. Summers, Judicial Review of Labor Arbitration or Alice Through the Looking Glass, 2 Buff. L. Rev. 1 (1952).
61. For a complete review of recent cases in the entire field, see Martin Domke, Arbitration, 29 N.Y.U. L. Rev. 676 (1954).
62. Address at First Night-Session of Manhattan Small Claims Part of Municipal Court, N.Y.L.J. September 21, 1954, p. 1.

the human creature to substitute compromise—that is what, in its broadest sense, the judicial process really is—for brute strength rendered ineffectual by an equipoised counterpart. After countless millenia, that historic lesson may have telling implications in the fateful drama being enacted on a world-wide stage today.

One of the earliest codes to bridge the chasm between savagery and humanity was the formulation of the Seven Laws of Noah. According to one tradition, the first of these ordained the establishment of forums for peaceably resolving disputes, without, however, prescribing in detail how they should be constituted or conducted.

It is sometimes suggested that arbitration is apt to lead to compromise rather than adjudication. But analysis of the suggestion shows that, far from being a sound objection, it is in reality an added reason for resorting to arbitration.

The law has always favored compromises. Under some ancient legal systems, the judge was required to attempt conciliation before proceeding to trial; and common law courts have ever been alert to uphold settlements fairly made. For seldom is one side wholly right and the other altogether wrong; and a compromise can take account of and effect equities which a formal judgment may be unable to do. So it is often said a bad settlement is better than a good lawsuit; the layman thinks it more expedient and the experienced judicial officer knows it achieves a more just result.

In recent years, the accent has been on settlements; in every utterance on the work of the courts, the Presiding Justice has urged them. To be sure, the occasion generally has been an attempt to relieve intolerable calendar congestion; but in his memorable Cardozo Lecture the Presiding Justice declared the underlying philosophy of intrinsic validity for compromise: "Most cases present a test of judgment and diplomacy of counsel more than of legal or forensic ability."[63] Arbitration is midway between settlements by the parties and adjudications by courts; and includes the best features of both.

The rejection or whittling down of arbitration agreements and awards may flow from hostility or distrust on the part of the courts. Whatever the cause, conscious or unconscious, the courts should recognize that they, too, are but a human institution, devised for the settlement of disputes. The make-up of courts and their procedures vary from jurisdiction to jurisdiction, even in the United States. The common law is not accepted universally, and justice is administered

63. 9 Record of Association of the Bar 272 (June 1954).

in many civilized countries under other systems of law. The common law courts themselves eventually adopted many rules of the law merchant, which embodied the experience and practices of the merchants.[64] When a court vacates an arbitration award because it does not conform to a rule of the common law, however fair and sound that rule may appear, it exposes its blindness to these obvious truths.

It is useless to cast off the time-worn shibboleths unless the spirit and thought which they housed are cast off with them. We should acknowledge frankly that essential as courts of justice are in our civilization, neither they nor the system of law which they administer furnish the only feasible means of adjusting controversy without violence. The public good demands the peaceful resolution of conflict, not the maintenance of the jurisdiction of the courts or the supremacy of the common law. When these plain truths are accepted, the courts will cease to treat arbitration as an intruder or a step-child.

Chief Justice Stone refers to the sober second thought of the community as the firm base on which law must rest.[65] It may be in order for the judiciary to take a second hard look at its past attitude toward arbitration, and, revising it, recapture the confidence of the business community. For, self-restraint is becoming to authority, and the grace of self-discipline is the crown of power. Indeed, the true ideal of humility "looks for it in the active leader," since it is not a negation, but an affirmation—an awareness—of "supreme inner worth" arising from self-reverence as part of a universal reverence. That, I think, is the inward meaning of the sublime dictum that the meek shall inherit the earth!

64. The early courts did not readily accept the practices embodied in the law merchant. Although the common law courts began to deal with bills of exchange in about 1600, a century later they still would not recognize a promissory note, slightingly referred to by Chief Justice Holt in 1704 as "only an invention of the goldsmiths in Lombard Street." Indeed, it was not the courts but the legislature that finally compelled recognition of this common commercial transaction (Statute of Anne). And it took another sixty years before commercial law achieved judicial respectability when Lord Mansfield lent his great authority to acceptance of the commercial approach and even sought advice from a committee of merchants on their customs and practices.

65. Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 25 (1936).

RECENT PROBLEMS IN ARBITRATION OF SENIORITY DISPUTES

Thomas A. Knowlton

The promise of job "ownership" through seniority, or the complete elimination of "favoritism," has probably persuaded more American workers to join unions than any other single element in the employment relationship. To the average employee, the seniority clause of a collective bargaining agreement has a dual purpose: it protects his right to work at his present job or at another in case work becomes unavailable in his own classification; and it defines his right to be considered for possible advancement to a better paying or otherwise more desirable job.

From management's point of view, the seniority clause sets limits to freedom of action in job assignments. As such, it undoubtedly constitutes a restriction of traditional "management prerogatives" to "direct the work force."

Out of the clash of objectives which takes place at the bargaining table, there generally emerges a compromise formula which expresses in some degree the relative weights to be given to seniority and ability in the separate matters of promotion and layoff.

As a first general proposition, one may argue that seniority clauses are considerably influenced by the business cycle. Seniority clauses which date back to the 1930s tend to be "strong" from the unions' point of view, with respect to layoffs. They were written at a time when layoffs were numerous and workers were conscious of possible unemployment. Safeguards to protect older men were worth fighting for. At the same time, there was less insistence by unions on the promotional aspects of seniority. A typical clause of that period would emphasize the importance of seniority in layoffs and rehirings and recognize the right of management to promote on the basis of ability, on a "non-discriminatory" basis.

Seniority clauses which were first drafted during or since World War II in a time of generally expanding job opportunity are more likely to qualify the layoff clause with the factor of ability. For many of the newer unions, there were comparatively few occasions in the

last fifteen years for employees to become aroused over the possibility of widespread layoffs. Negotiations involved wages, vacations, pensions, and other "fringe" benefits. The seniority clause was relegated to the background simply because no one, on either side of the bargaining table, considered it to be an immediate problem.

Recently, however, with the stabilizing of employment, or an actual employment decline in some industries, we now have a large number of arbitrations involving the interpretation of seniority clauses where the intent of the parties was vague and, indeed, forgotten, and where contract language was inadequate to the present situation.

In the arbitration of grievances, unions and management alike are understandably insistent that decisions be rendered within the framework of the contracts which the parties have drawn up. Grievance arbitration is a judicial, not a legislative process, and arbitrators are limited to interpretation of the meaning of the collective bargaining agreements. The unfortunate fact is, however, that in too many cases, particularly where seniority clauses were drafted in a different economic setting, and carried over without change from year to year, arbitrators are given insufficient guidance for interpreting the agreement today.

As an example, one may cite the language of a contract first negotiated in 1943. It states that "in layoffs and rehiring, the Company shall observe the principle of seniority" and goes on to explain that laid-off employees are entitled to a trial period on a different job, except that, if the employees demonstrate a lack of ability on the new job during the trial period, they are subject to layoff until the original job reopens.

This total clause means something quite different from a clear recognition of seniority in layoffs. It means actually that employees are selected for layoff on the basis of their seniority and ability—with ability to be the final consideration. Such an interpretation came as a considerable shock to the employees, who generally had not questioned the initial statement as to the observance of the "principle" of seniority. As a matter of fact, in the first ten years of existence of this clause, it had not been tested.

Examples of this sort can be multiplied endlessly in the experience of arbitrators throughout the country. A subsidiary, but very important question with respect to this particular clause arose about the extent to which bumping was to be practiced. What would happen to the person displaced from the job on which the laid-off employee received a trial period? Was he to be the most junior

employee? Or was he in turn to bump someone else from a lower paying job? One may speculate as to the number of job changes which might result from a layoff of a comparatively few employees in a department where the average seniority is high.

An interpretation by an arbitrator in the face of a serious layoff places rather a strain on the arbitration principle. It is almost as if the arbitrator were asked to write the whole clause and to do so, moreover, at a time when the dispute is most heated. Of course, arbitrators are individually expendable. At the same time it must be remembered that "the interpretation or application" of the language of an agreement strongly implies the existence of adequate guides to be provided by the parties themselves. Where such guides do not exist and the arbitrator is filling in blanks, we do not have proper recognition of the limits of grievance arbitration. A union-management relationship which has not extended through a complete business cycle is likely to result in a contract containing a number of such blank spaces. These are especially serious in the seniority clause.

One may state as a second general proposition that arbitrators tend to "favor" the employee in the interpretation of seniority clauses when the issue is a layoff and to "favor" the employer when the issue is promotion. It is common to find clauses stating in effect:

> ". . . that in layoffs, rehirings and promotions to jobs within the bargaining unit, seniority and ability shall be considered and, if ability is relatively equal, seniority shall govern."

If the question is whether, under this clause, John Doe or Richard Roe should be laid off, there is an initial assumption that the two men occupying the same classification and receiving the same rate of pay are "relatively equal" in ability. This assumption may be overcome by evidence of unusual circumstances but it is comparatively rare that the employer is able to advance convincing proof that the junior employee should be retained.

It is to be noted that in such a situation, seniority is normally the only variant which is subject to precise measurement. The calendar is exact; ability is frequently a matter of opinion. It is also to be noted that seniority is not a relative matter. The decision does not rest on the result of equating one relationship: "relative ability," with another relationship: "relative seniority." If that were the case and it were found, say, that John Doe had 10% greater ability than Richard Roe and only 9% less seniority, the answer would be clear. Even if there were a way to measure seniority in terms of percentages, the clause does not permit of this interpretation.

The only question which the arbitrator needs to determine is whether the 10% greater ability comes within the language of "relative equality." If so, then, even if the difference of seniority is as little as a few days, the senior employee will be retained.

The language which was quoted above, that layoffs and rehirings are to be governed by seniority if ability is relatively equal, is rewritten by some arbitrators to say, in effect, that layoffs shall be governed by seniority unless the employer can prove that his operations would suffer marked damage unless junior employees are retained.

In considering *promotions* under the same seniority-ability clause, arbitrators much more frequently rely on supervisors' estimates and management's appraisals of "ability." This shift of emphasis probably stems from the assumption that even the unpromoted employee is not "losing anything." He still has the job for which he is being paid and, while one may well argue that the lack of opportunity for promotion is a hardship, it is not of the same order as a layoff and a consequent complete lack of earnings.

Usually, in promotion cases, under this type of clause, the union's success depends on being able to prove animosity toward the unpromoted senior employee on the part of his supervisors. Occasionally, one encounters claims of anti-union bias, where the senior employee has been active in, say, grievance handling. But in the few cases where personal animosity and anti-union prejudice may be present, proof of the allegation is extremely difficult in arbitration.

In effect, in an issue of promotion, the language of the seniority clause which was referred to above might be interpreted by some arbitrators to mean that in promotion to jobs within the bargaining unit, seniority and ability shall be considered and, unless the union is able to prove personal bias or hostility toward the union on the part of supervisors, the employer's judgment shall govern.

There is at least one exception to this general proposition. If the promotion question involves a change within a broad classification as, for example, from Carpenter "C" to Carpenter "B" or from Toolmaker "B" to Toolmaker "A," there is much more likely to be evidence of relative ability based on previous work preformance, spoilage, etc. If such evidence is not forthcoming, the mere stated preference by supervision in favor of the junior employee does not carry much weight.

In conclusion, I believe that it is fair to assume that, other things being equal, an arbitrator is more likely to protect a senior employee against layoff than to grant him opportunity for advancement.

ENFORCEMENT OF FOREIGN AWARDS IN ENGLAND

L. J. Blom-Cooper

The paucity of judicial decisions on the question of the enforcement of foreign arbitral awards has created a vacuum in the field of private international law and particularly in relation to international commerce. Even with the enactment in England of the Arbitration Clauses (Protocol) Act 1924 and the Arbitration (Foreign Awards) Act 1930, which were passed pursuant to the Geneva Protocol of 1923 and the Convention of 1927, now embodied in Part II of the Arbitration Act 1950, the Courts have been infrequently called upon to enforce an arbitral award made abroad.[1] This is, no doubt, in large measure attributable to the fact that arbitration is "so ancient and well developed an institution in England that most arbitrations which had any connexion with England were held in England."[2] With the trend in recent years of the world's markets from London to New York, the English courts will increasingly be faced with the attempts by successful parties to arbitration proceedings held abroad to have their awards enforced in England.[3] It is

1. Apart from the recent decision of the Court of Appeal in *Kianta Osakeyhito v. Britain and Overseas Trading Co.*, (1954) 1 Ll. L. Rep. 274, in which section 37 of the 1950 Act was considered—the only reported case on Part II of the Act—there have been only three cases dealing directly with the enforcement of foreign arbitral awards:- *Merrifield Ziegler & Co. v. Liverpool Cotton Association*, (1911) 105 L.T. 97; *Bankers and Shippers Insurance Co. of New York v. Liverpool Marine & General Insurance Co.*, (1924) 19 Ll. L. Rep. 335, (1925) 21 Ll. L. Rep. 86 (C.A.); (1926) 24 Ll. L. Rep. 85 (H.L.); *Norske Atlas Insurance Co. v. London General Insurance Co.*, (1927) 43 T.L.R. 541.
2. Lorenzen: *Commercial Arbitration—Foreign Awards* in Selected Articles on the Conflict of Laws 522 (1947).
3. Signs of this move are becoming apparent. See *East India Trading Co. Inc. v. Carmel Exporters and Importers Ltd.*, (1952) 2 Q.B. 439; (1952) 1 All E.R. 1053, where the plaintiff, an American company, sued the defendants, an English company, in England upon a New York judgment which gave judicial effect to an award made upon an arbitration in that State. The action in England concerned the amount of money to be paid in English currency ($4.03 or $2.80 to the pound sterling) and was considered on the basis of a foreign judgment. Indeed Order XIV pro-

well-known that the U.S.A. was not a party to the Geneva Agreements and that any award emanating from the United States can only be enforceable upon the rules pertaining to foreign awards prior to the enactments pursuant to the Geneva Convention. Such rules as existed at common law prevail to-day, the present sections of the 1950 Act being purely discretionary and not prejudicing any rights which any person would have had of enforcing in England any award or availing himself of any award if the Act had not been passed.[4] It is in an attempt to state with some particularity the rules of the Common Law that this article is concerned.

Due to the infrequency with which the matter has come before the English Courts, the text-books have either been unhelpful in indicating any view on a question "not yet definitely settled in English law" or, in attempting to do so, have been merely speculative. Most writers are of the opinion that a foreign award in order to be enforceable in England must have the attributes of a foreign judgment and satisfy the requirements as to the rules relating to the latter. Rule 95 in Dicey[5] states, citing the *Norske* case as its authority: "A foreign arbitration award has no direct operation in England but, if it fulfils the conditions requisite for the validity of a foreign judgment, it may be enforced by an action at the discretion of the court." The comment to the rule is despairingly brief and uninformative. Graveson affirms[6] that the English Courts apply the same principle to foreign arbitration awards as to foreign judgments. Cheshire, it is submitted, recognizes the peculiar problems inherent in a foreign award without amplifying the position. He says:[7] "The foreign award is on the same footing as a foreign judgment in the sense that an action to recover the sum awarded may be brought in England. The essentials of success are proof that the parties submitted to arbitration, that the arbitration was conducted in accordance with the submission, and that the award is valid by the law of

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ceedings for summary judgment were commenced on the total amount owing, leave to defend being granted only upon the amount of the difference between the two rates of exchange. Had the proceedings been considered on the footing that it was an enforcement of a foreign award, the judgment being merely facultative, it is unlikely that Order XIV proceedings could be successfully maintainable. For comments on this case, see Domke 2 Am. J. Comparative Law 238 (1953). See also *Macleod Ross & Co. Ltd. v. Compagnie d'Assurances Generales l'Helvetia of St. Gall*, (1952) 1 All E.R. 331, in which a policy of insurance contained a Swiss arbitration clause.

4. Dicey, Conflict of Laws, 6th ed. (1949) p. 403.
5. *Ibid.*, p. 433.
6. Conflict of Laws, 2nd ed. (1953) p. 419.
7. Private International Law, 4th ed. (1952) p. 589.

the country in which it has been made." This seems to point to a recognition of the fact that an arbitration award is more in the nature of a contractual obligation than a judgment. Martin Wolff,[8] in a chapter dealing with the enforcement of foreign judgments significantly points out that there is no doubt that the party in whose favour the award is given can bring an action on the award without going back to the original cause of action and that is equally applicable to a foreign award. "But," he maintains, "such action on an award is not an action on a foreign judgment given by a court of law." Perhaps the most interesting observations are those of Schmitthoff in a recent edition of his "Conflict of Laws,"[9] for the learned author has devoted some space to the topic and also considered in some detail both the *Norske* and *Merrifield Ziegler* cases. He concludes his discussion by saying:[10] "It is believed that a foreign award creates a new obligation *only if it has the status of a judgment in the country in which it is made.* The reason why a foreign judgment is attributed that quality is that it represents the act of a foreign sovereign which if issued within the limits of territorial jurisdiction is accorded international recognition. A foreign award which is founded on the contract of the parties, and is not given the status of a judgment in the country in which it is made, cannot claim the same international status as the act of a foreign sovereign. It follows that, unless the plaintiff can satisfy the English Court that the award is treated, in the country where it was made, like a judgment of the court, he should sue on the original cause of action [see the opposite view of Wolff] but even in that case he should plead the award because it might, in appropriate cases, be regarded by the English Courts as conclusive between the parties."

The fundamental obstacle to a proper analysis of the subject is, it is believed, in the confusion caused by the very nature of an arbitral award. It has been maintained by one learned writer[11] that the dual nature of an award has caused difficulties inasmuch as the award savours both of contract and of judgment. Such difficulty, no doubt, in these circumstances, is inevitable but, it is submitted, in fact an arbitral award is only a judgment in the lay and non-technical sense. No doubt the appointment of one or more persons to adjudicate a dispute between parties, and his (or their) decision on

8. Private International Law, 2nd ed. (1950) Para. 237(2), p. 256-7.
9. 3rd ed. (1954) pp. 487-9.
10. *Ibid.*, p. 489.
11. Crease: *The Enforcement of Awards Made Abroad* in Journal of the Institute of Arbitrators, Vol. XVII, London (1951) 27.

that dispute, give the impression of a judgment. To such an extent, and only to that extent, the award is a judgment. Arbitrators are not judicial officers. They are not appointed as part of the legal system of any country; indeed they do not even attain the position of members of a tribunal appointed by the executive, such as the members of an (English) Rent Tribunal[12] or a Pensions Tribunal. They are appointed by the express desire of parties to a particular contract to act in the event of disputes arising out of that contract and it is within these narrow limits that they are authorized to act. Their decision is effective only as between the parties to the dispute. No consequences arise out of their decision other than the expression or fulfilment of the contractual obligation of the disputants.

Furthermore, an award cannot give rise to the power to execute upon the award, thus excluding the machinery or sanctions of the law. In England, in order to allow of an execution, judgment on the award must be sought under section 26 of the Arbitration Act 1950.[13] The matter is stated correctly by Piggott:[14] "The decision of any dispute by any other person or body [i.e., other than a court of law], even with consent of the parties, does not amount to a judgment; the remedy in case of failure to carry out the decision would probably lie on the contract to refer the dispute and accept the decision." The learned author goes on to say, however, that an award of an arbitrator abroad does not come within the definition of a foreign judgment until it is made an order of the court. This represents the general consensus of opinion on the enforcement of awards if indeed the award must be in the form of judgment before it can be enforced. It is submitted that no such merger of the award in a judgment is necessary for the purposes of enforcement. It is clear, however, that Piggott accepts the view that an award is not in any sense a judgment, a view which found favour with Wolff. There is further support to be gleaned from the views of Kahn in a masterly treatment of this subject, entitled "Arbitration in England and Germany."[15] He indicates the fallacy of the notion that an award is a

12. The analogy was drawn, it is believed incorrectly (see 217 Law Times 15, Jurisdiction of Arbitrators), by Devlin, J. in *Christopher Brown Ltd. v. Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbetriebe Registrierte Genossenschaft m.b.H.*, (1954) 1 Q.B. 8 at pp. 13-14.
13. The method of invoking the sanctions of the law in the case of arbitration awards varies considerably. In some legal systems, the method is merely administrative, resembling a "rubber-stamp" operation. See the Canadian case *Stolp & Co. v. Browne & Co.*, (1930) 4 D.L.R. 703.
14. Foreign Judgments and Jurisdiction (1908) pp. 95-6.
15. Journal of Comparative Legislation Vol. XII (1930) p. 58, 228.

judgment by citing the example of German law which up till the date of writing (1930) contained a formula on the question of enforcing a judgment, stating, "Execution may ensue out of an award . . ." merely by an administrative act. "This," he says,[16] "is clearly not a foreign judgment *in rem* or *in personam,* which the English Courts could recognize. It certainly does not condemn a party to pay a certain sum, and it is not the judgment of a competent court, because only an English Court can give leave to enforce an award or allow an action on an award with effect for England." It is submitted, therefore, that the only way to treat awards is according to the principles applying to contracts and any other principles will destroy the great scope which arbitration offers for giving effect to foreign awards, whereas judgments, for reasons of sovereignty and the doctrine of reciprocity, could not be effectual in the foreign country. How far the Geneva Convention has met this need in the case of signatories to that Convention is a matter for consideration and not germane to the present discussion.

The presence of an arbitration clause in an international contract has received judicial consideration by the English Courts in two cases of respectable antiquity—at any rate so far as the field of private international law is concerned. If parties to such a contract specify that, in the event of any dispute arising out of the contract, arbitration shall take place in country X or according to the laws of country X, then they are presumed to have intended the law of that country to apply. In accordance with the well-established principles laid down by Lord Atkin in *Rex v. International Trustee for the Protection of Bondholders,*[17] and Lord Wright in *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society Ltd.,*[18] an arbitration clause would be conclusive of the choice of law made by the parties and therefore to be applied to the contract on the basis of *qui elegit judicem, elegit jus.*[19] It has been conceded by those who favour the objectivist theory of

16. *Ibid.* p. 246.
17. (1937) A.C. 500 at p. 529.
18. (1938) A.C. 224 at p. 240. The principle as expressed by both Law Lords was reaffirmed recently by the Court of Appeal in *The Assunzione,* (1954) 2 W.L.R. 234.
19. See the following cases: *Pena Copper Mines v. Rio Tinto Co. Ltd.,* (1912) 105 L.T. 846; *Kirchner & Co. v. Gruban,* (1909) 1 C.A. 413; *N. V. Kwik Hoo Tong Handel Maatschappij v. James Findlay & Co.,* (1927) A.C. 604; *Perry v. Equitable Life Assurance Society of the United States of America,* (1929) 45 T.L.R. 468; *Austrian Lloyd S.S. Co. v. Gresham Life Assurance Society Ltd.,* (1903) 1 K.B. 249; see also Wolff, n. 8, p. 419.

the proper law of the contract that an arbitration clause in a contract was a necessary exception to the theory.[20] In *Hamlyn* v. *Tallisker Distillery Co.*,[21] it was held by the House of Lords that, in a contract for the sale of barley by English commercial merchants to a Scottish distillery containing an arbitration clause, English law applied both as to the essential validity of the contract and the arbitration clause itself. *In Spurrier v. La Cloche*,[22] the Privy Council, sitting as the highest Court of Appeal from the island of Jersey, were concerned with the proper law of an insurance contract. A man living in Jersey insured his stamp collection against fire by a contract made in Jersey with an agent of an English insurance company. The premiums and any sum payable under the policy were to be paid in Jersey. The contract contained an English arbitration clause. It was held that the parties had thereby impliedly chosen English law to govern their contract. In the recent case of *Kianta Osakeyhito v. Britain & Overseas Trading Co.*,[23] it was not doubted that a contract providing for any arbitration proceedings to be held in Helsingfors, Finland, was to be governed by Finnish law.[24]

It is now necessary to direct attention to the cases to see how far the Courts have recognized the contractual nature of foreign awards. The most helpful case in point is a judgment of the Court of Appeal (Slesser and Romer, LJJ.) on an interlocutory appeal concerning service outside the jurisdiction within Order XI r.l(e) in *Bremer Oeltransport G.m.b.H. v. Drewry*.[25] In that case, a charter party made in London provided that in the event of any dispute arising during the execution of the charter party the dispute should be settled by arbitration in Hamburg, Germany. Disputes arose and an arbitration was conducted in Hamburg, the outcome of which was that the arbitrators directed the defendant to pay ap-

20. Cheshire, n. 7, p. 212.
21. (1894) A.C. 202.
22. (1902) A.C. 446.
23. (1954) 1 Ll. L. Rep. 274.
24. See Schmitthoff, n. 9, p. 487 where the learned author gives an example in which the nature of the arbitration clause might not be conclusive on the question of the proper law of the contract. The illustration itself indicates the unlikelihood of such an eventuality, for he instances the case of a partnership agreement wholly connected with England containing an arbitration clause appointing a relative of the partners domiciled in Nice, France as arbitrator where the relative himself had formerly been a partner.
25. (1933) 1 K.B. 753. See also Phillimore, J. in *Allen & Sons v. Leensteinster* (May 4th 1899) and Farwell, J. in *Cranbach v. Cohn* (Dec. 28th 1900), quoted as unreported cases in the Annual Practice 1954 p. 106, cases in which both judges held that an action on an award was an action of contract within the meaning of rule 1(e) of Order 8.

proximately £20,000 in English currency. The plaintiffs, who were a German company, sought to issue the writ on the defendant who was residing in France claiming the amount due under the award. The Court dismissed the defendant's appeal holding that the contract was one partly within and partly without Order XI rule 1(e) and, in exercising its discretion, allowed the writ to be issued. In the course of his judgment Slesser, LJ. asked himself what was the nature of an action based upon the award. During the course of considering this incidental question, which was unnecessary for the decision, he quoted with approval the famous dictum of Holt, CJ. in *Purslow v. Baily*[26] to the effect that the submission to arbitration is an actual mutual promise to perform the award of the arbitrators. The defendants relied, not unexpectedly, on the decision of MacKinnon, J. in *Norske Atlas Insurance Co. Ltd. v. London General Insurance Co. Ltd.*[27] which is cited as the authority for the proposition that an award can be enforced only if it conforms with the prerequisites for the enforcement of a foreign judgment. In that case the plaintiff's claim was based on an award made in Norway by Norwegian arbitrators. The defendants maintained that the award was made pursuant to a submission in a treaty of reinsurance against marine risks in a written agreement and that the treaty, being a treaty of marine insurance, was not expressed in a policy sufficient to satisfy both the Stamp Act and Marine Insurance Act. MacKinnon, J. said:[28] "If the plaintiffs had been suing on the treaty of insurance for marine losses incurred the defence raised would have been fatal to them because the contract was one of marine insurance which was not effected by a policy and was not properly stamped. The plaintiffs, however, were not suing on the contract but on the award and the only things to be proved by them were (1) the submission, (2) the conduct of the arbitrators in accordance with the submission, and (3) the fact that the award was valid according to the law of the country where it was made." Commenting on this passage, Slesser, LJ. in the *Bremer* case said:[29] "Certainly in this case [*Norske* case] MacKinnon, J. seems to treat the action as one upon the award as such and not as an action on the marine insurance contract which he finds was invalid. The issue which I have here to consider was not

26. (1705) 2 Ld. Raymond 1039 at p. 1040. See also Eldon, LC. in *Wood v. Griffith*, (1818) 1 Wils. Ch. 34, and Knight Bruce, LJ in *Nickels v. Hancock*, (1855) 7 DM & G 300 at p. 314.
27. (1927) 43 T.L.R. 541.
28. *Ibid.* p. 542.
29. (1933) 1 K.B. at p. 760.

directly argued before the learned Judge, the point being, according to counsel, whether the contract of marine reinsurance was or was not invalid and the authorities cited were none of them related to the problem whether the action was brought upon the award or upon the contract of submission. Nor does the learned Judge, although his decision on the point is clear, cite any authority on that head." MacKinnon, J. clearly ignored the idea that there was a contract of submission. If indeed the plantiff could not satisfy the requirements laid down by him, then it would be necessary to sue on the original cause of action. It has been pointed out that this view is untenable and indeed Slesser, LJ. himself rejects the proposition.[30] Indeed there would appear to be so much doubt thrown upon the decision in the *Norske* case that it can scarcely be regarded as authoritative or, for that matter, of any serious obstacle to a contrary view. There seems, moreover, little doubt from the earlier authorities, cited in the *Bremer* case but not in the *Norske* case, that the greater weight of authority is in favor of the view that in an action on an award the action is substantially founded on the agreement to submit the differences, of which the award is the result. Slesser, LJ. concluded this part of his judgment circumspectly, stating that "the few cases which appear to support the view that an action may be brought upon the award in my view do not exclude in any event an action brought upon the agreement to refer differences and for this purpose, in my view, the submissions are sufficiently stated to be in the charter party."[31] Lorenzen, commenting on this decision, asks:[32] "Does not the action rest upon both the submission agreement and the award?" With respect, whilst this is undoubtedly true, the award itself is only somewhat referable to an agreement to submit disputes to arbitration and it is the contractual obligation which gives rise to an implied agreement to abide by the award. No such implication can be spelt out of the award by itself.

The earlier case of *Merrifield Ziegler & Co. v. Liverpool Cotton Association Ltd.*,[33] which similarly was not cited in the *Norske* case, involved an action in the High Court to enforce a German award. The award was held to be binding and valid according to German law by Eve, J. but the action was dismissed because the plaintiffs

30. There is some support for the proposition of MacKinnon, J. in the old case of *Hodsden v. Harridge*, 2 William's Saunders 150.
31. (1933) 1 K.B. at p. 765.
32. Op. cit. n. 2 p. 253.
33. (1911) 105 L.T.97. The decision of Eve, J. was acted upon by Logie, J. in the Supreme Court of Ontario in *Stolp & Co. v. Browne & Co.*, (1930) 4 D.L.R. 703.

had not affirmatively proved that under German law a German submission imports an implied contract to perform the award, and failing this the German award could not be held to be a foreign judgment which the English would recognize as such. This case is used by some writers, particularly Schmitthoff, as showing that a foreign award which is by the law of the foreign country not enforceable without an order of the court of that country, is not a judgment of a foreign tribunal which can be enforced by action in the English courts. One cannot cavil with the decision so far as it goes but it does not follow from this proposition that a foreign award cannot be sued on in England without an enforcement order of the foreign court and, furthermore, that a foreign award to which an enforcement award was granted could be a foreign judgment upon which an action could be granted in England. Limited to the narrow proposition suggested above, the case is of little assistance. Had Eve, J. in the *Merrifield Ziegler* case considered that the action in England was based on the contract of submission, he would then have been able to characterize the German rule as to the method of enforcement in that country as a purely facultative and administrative act and part of the law of procedure,[34] and therefore the action in England would be on the award itself irrespective of the facilitating order of the foreign court.[35] The learned Judge seemed to recognize this position when he said:[36] " . . . for all practical purposes it [the award] is still-born until vitality is inured into it by the Court." This analogy may well extend only to the recognition that the award can bring into play the sanction of the law only when the judgment is entered and for this purpose is "still-born." Eve, J. seems partly to have based his objection to giving judgment upon the award because in doing so he would be giving the defendants power to carry out execution in England in respect of an award of which no execution could be levied in the country where it was made. With respect, this should be no reason for refusing enforcement, for the plaintiffs should

34. See Re Cohn, (1945) C.A. 5; *Jabbour (F&K) v. Custodian of Israeli Absentee Property*, (1954) 1 W.L.R. 139 at p. 147-8 per Pearson, J. characterizing a rule of Israeli law.
35. In English law, an action on an award is brought before the judge under section 26 of the Arbitration Act 1950. The action may well be *ex parte*, but unlike many systems a plaintiff must still strictly prove the contract and the submission and the subsequent award and the court must be satisfied that the Arbitration Act has been complied with. See Devlin, J. in *Christopher Brown Ltd. v. Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbetriebe Registrierte Genossenschaft m.b.H.*, (1954) 1 Q.B. 8.
36. (1911) 105 L.T. at p. 106.

not have to be put to unnecessary methods of procedure which would prove abortive in the foreign country, and which might involve delay in prosecuting their claim. In these circumstances it is submitted that the *Merrifield Ziegler* case does not advance the matter and can only be authority for the limited proposition outlined above.

The only other case on the subject, and the only action on an award made in New York, was the case of ***Bankers and Shippers Insurance Co. of New York v. Liverpool Marine and General Insurance Co. Ltd.***[37] In that case, the defendant English reinsurance company had entered into a series of reinsurance treaties with the plaintiff American company. Considerable losses were incurred and the defendants, as they were entitled so to do, gave notice of termination of the contract. The plaintiffs pressed for arbitration, in New York, as provided in the arbitration clause of the contract, to which there was no reply. The two arbitrators appointed by the plaintiffs communicated with the defendants to the effect that they were proceeding with the arbitration. The defendants cabled back that they were not taking part and were contesting the authority of the arbitrators. An umpire was appointed. The whole of the contest in the English enforcement proceedings turned upon the construction of the Arbitration Act of 1920 operative in the State of New York at the time, whether, on the designation of the arbitrators where one of the parties was in default under the submission agreement by refusing to proceed to arbitrate an issue covered by the agreement, it was necessary to obtain the sanction of the Court to proceed *ex parte* on the arbitration. The trial judge, Bailhache, J., found for the defendants on the ground that, having heard conflicting expert evidence by New York lawyers, the provision in the New York Statute was not procedural but substantive and gave rise to a valid defence. It is precisely such a defence that is envisaged as being available on proceedings to enforce an award. The court characterizes the provision and only if it is procedural may he ignore it, for on procedural matters the *lex fori* pertains. Bailhache, J. considered the provision not a remedy applicable to the enforcement of an award; it was a remedy which "lay on the threshold of the case and has to do with the ultimate validity of the award."[38] He clearly recognized the contractual basis for the action on the award when he concluded:[39] ". . . this

37. (1924) 19 Ll.L. Rep. 335 reversed by the Court of Appeal, (1925) 21 Ll.L. Rep. 86; trial judge's decision restored by the House of Lords, (1926) 24 Ll.L. Rep. 85.
38. (1924) 19 Ll.L. Rep. at p. 338.
39. *Ibid.* at p. 339.

award is a nullity according to the law of New York and that I cannot enforce it here." The Court of Appeal, in reversing Bailhache, J, did so on the question of the characterization of the New York provision and not on the statement of principle and impliedly rejected the basis of the decision of Eve. J. in *Merrifield Ziegler*. Before the case came before the House of Lords, the Supreme Court of the State of New York had decided in *Bullard v. Morgan H. Grace Co.*[40] that the rule as far as domestic cases were concerned was one of substance, and the House of Lords without employing the rules of conflict of laws felt bound by this authority and upheld the trial judge. In a learned article, 'Enforcement Abroad of American Arbitration Awards,'[41] Martin Domke has commented:[42] "Thus the question of enforcement of an American award in England can hardly be determined on the authority of the *Bankers* case." With respect, this is hardly giving sufficient credit to the judgments of the trial judge and of the Lords Justices of Appeal. In both courts, nothing was said that detracts from the view that an action on a foreign award could not be maintained on the basis that it was ultimately a question of the contractual agreement to submit and abide by the award. Furthermore, all these judges considered within the limited scope of the particular case the essentials for suing on an award. All of them characterized the New York provision to ascertain whether in an action on the award it afforded a defence in substance or was merely a procedural bar which the English court would disregard. It is submitted that the *Bankers* case in the two lower Courts is support for the view that a foreign award can be sued on without the notion of a foreign judgment being present.

CONCLUSIONS

1. A foreign arbitration award is in no sense assimilable to a foreign judgment and the rules relating to the latter are inapplicable and inappropriate to foreign awards.

2. In suing on an award the plaintiff bases his action on the contractual agreement to submit all differences arising out of the

40. 240 N.Y. 338, 148 N.E. 599 (1925). The New York Arbitration Law was later amended to remove the rule laid down in this case, to the effect that no court procedure is necessary to proceed in an arbitration against a defaulting party.
41. Law and Contemporary Problems Vol. 17 (1952) pp. 545-566.
42. *Ibid* at p. 556; see also Domke, American Journal of Comparative Law Vol. 2 (1953) p. 238 at p. 241.

original contract to arbitration, which implies a contractual agreement to abide by the award, thereby extinguishing the original cause of action. This should be an implication of law arising *quasi ex contractu.*

3. The above article has adumbrated that a defendant, when sued in England on an award rendered abroad, may raise any defence open to him under the arbitration law of the foreign country which is characterized by the English judge as substantive, any procedural defence being available to him by the *lex fori,* i.e., English law. Whether the plaintiff has sought to obtain a judgment on the award in the foreign country is immaterial. If, however, the fulfillment in the foreign country results from a contested action, the plaintiffs may conveniently sue on the judgment. (See *East India Trading Co. v. Carmel Exporters and Importers Ltd,* [1952] 2 QB 439, also supra note 3).

4. The conclusions expressed in 3 above give rise to some difficult problems, one of which will be briefly referred to. The substantive rules of the foreign arbitration laws may offend the notions of English arbitration laws, and particularly may this be so in connection with the scope of the arbitrators' jurisdiction, particularly in view of the limited inquiry of an arbitrator's own jurisdiction allowed in English law (see Devlin, J. in *Christopher Brown Ltd. v. Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbetriebe Registrierte G.m.b.H.,* [1954] 1 QB. 8). In this connection it would be necessary to compare the rules under Part II of the Arbitration Act 1950 and, more particularly, section 37 which states that an award must be "in respect of a matter which may lawfully be referred to arbitration under the law of England; and the enforcement thereof must not be contrary to the public policy of the law of England." Can a foreign award at common law be in a better position than under the Act?

5. Whilst there can be at common law direct enforcement of a foreign award as indicated, the difficulties of sustaining the action may be as insurmountable as those on a foreign judgment.

READINGS IN ARBITRATION

Articles and Comments in Legal Periodicals

The ability of an individual employee to sue his employer on a collective bargaining agreement. 3 Buffalo Law Rev. (1954) 270-282.

Arbitration and Award. By Wesley A. Sturges. 25 Mississippi Law Journal (1954) 181-189.

Arbitration and Judicial Settlement—Recent Trends. By Laurent Jully. 48 American Journal of International Law (1954) 380-407.

Arbitration Under the Securities Act of 1933 (*Wilco v. Swan*, 346 U.S. 427) 49 Northwestern University Law Review (1954) 101-106; reprinted in N.Y.L.J. October 29, 1954.

Enforcement of Labor Arbitration Agreements: Is Refusal to Arbitrate an Unfair Labor Practice? 14 Louisiana Law Review (1954) 596-606.

The General Legal Status of Labor Arbitration. By J. R. Bennett. 1 South Texas Law Journal (1954) 26-46.

Judicial Exercise of Equitable Discretion in Enforcement of Arbitration Contracts. 21 University of Chicago Law Review (1954) 719-730; reprinted in N.Y.L.J., September 24 and 27, 1954.

Labor Law—A Framework and a Program. By M. Herbert Syme. 26 Pennsylvania Bar Association Quarterly (1954) 72-89.

Let's Arbitrate. By Harry J. Dworkin. 25 Cleveland Bar Association Journal (1954) 107, 118-120.

Liability Insurance as Applying to Arbitration Awards (*Madawick Contracting Co. v. Travelers Insurance Co.*, 307 N.Y. 111). New York Law Journal, June 9, 1954.

A New Look at the NLRA and Arbitration. By H. X. Summers and B. Samoff. 5 Labor Law Journal (1954) 535-542, 590, 592.

Settlement of International Disputes by Nonjudicial Methods. By Stanley D. Metzger. 48 American Journal of International Law (1954) 408-420.

State Arbitration Statutes Applicable to Labor Disputes. By R. W. Lillard. 19 Missouri Law Review (1954) 280-295.

Voluntary Arbitration: Its Legal Status and How It Works. By Marion Beatty. 22 University of Kansas City Law Review (1954) 191-216.

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *Arbitration Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

ARBITRATION CLAUSE ON REVERSE SIDE OF LUMBER SALES CONTRACT IS BINDING DESPITE FAILURE OF BUYER TO READ IT. Said the court: "Here, all we have, basically, is a failure by the purchaser to bother to read the contract, or to acquaint himself with its terms, because he was friendly with the lumber dealer. This is not enough to set aside an agreement. Petitioner is conclusively presumed to know the contents of the contract he signed and to have assented to its terms (Application of Levy, 271 App. Div. 431)." *Mott Gardens, Inc. v. Prudential Lumber Corp.,* N.Y.L.J., Oct. 7, 1954, p. 12, Huntington, J.

ONE-PAGE STANDARD FORM OF CONTRACT REFERRING TO "REGULATIONS OF THE AMERICAN FEDERATION OF MUSICIANS" AS "PART OF THIS CONTRACT" DOES NOT CONSTITUTE AGREEMENT TO ARBITRATE, where regulations referred to consist of 207-page booklet with "somewhat vague provision for arbitration by the International Executive Board of the Federation itself." Said the court: "It is not clear therefrom that such board was intended to act as impartial arbitrator of any dispute with plaintiffs, who contracted to engage an orchestra and who did not know of the arbitration provision. An intent to surrender one's right to resort to the courts must be clearly expressed. Plaintiffs were not bound by this alleged arbitration provision." *Weiner v. Mercury Artists Corp.* 284 App. Div. 108, 130 N.Y.S. 2d 570 (1st Dept. May 18, 1954, Dore, J.).

REFERENCE ON SALES SLIP TO COTTON YARN RULES DOES NOT CONSTITUTE CLEAR CONSENT TO ARBITRATE in spite of a provision to arbitrate included in those rules. The Court of Appeals denied a motion for reargument of decision digested in Arb. J. 1954, p. 48. *Riverdale Fabrics Corp. v. Tillinghast-Stiles Co.,* 307 N.Y. 689, 120 N.E. 2d 859 (June 3, 1954).

AGREEMENT TO ARBITRATE "IN NEW YORK CITY BY THE AMERICAN ARBITRATION ASSOCIATION" constitutes consent of the parties to the jurisdiction of the Supreme Court to enforce such contract (Civ. Prac. Act, sec. 1450), the court referring to *Zimmerman v. Cohen,* 236 N.Y. 15, *Gilbert v. Burnstine,* 255 N.Y. 354, and *Liberty Country Wear,* 197 Misc. 581. *Moly Motor Products Corp. v. Mozzone,* NYLJ, June 24, 1954, p. 4, Greenberg, J.

ARBITRATION WILL NOT BE DIRECTED ON BASIS OF ORAL AGREEMENT to take additional shipments on terms embodied in previous written contracts which were completely performed by both sides. Such oral agreement is not "in writing" within the meaning of Sec. 1449 C.P.A. *Debby Junior Coat v. Wollman Mills,* N.Y.L.J., Oct. 14, 1954, p. 7. Nathan, J.

ARBITRATION CLAUSE IN A WRITTEN CONTRACT IS ENFORCEABLE EVEN WITHOUT A SIGNATURE WHEN BUYER RETAINED AN "ACKNOWLEDGEMENT OF ORDER" WHICH CARRIED ON ITS FACE THE WORDS: "THIS CONTRACT SUBJECT TO TERMS AND PROVISIONS PRINTED ON REVERSE SIDE." A majority opinion of the Court of Appeals affirmed the decision, 283 App. Div. 705 (digested in Arb. J. 1954, p. 49) inasmuch as "the writing required by the first sentence of sec. 1449 C.P.A. has the same meaning as the words 'a written provision' in sec. 2 of Title 9 of the United States Code which has no provision at all for signature." *Helen Whiting, Inc. v. Trojan Textile Corp.,* 307 N.Y. 360, 121 N.E. 2d 367 (July 14, 1954, Desmond, J.).

EMPLOYER, JOINING ASSOCIATION, IS BOUND BY AGREEMENT WITH UNION TO ARBITRATE THEN IN EFFECT. The court dismissed as "untenable" the employer's contention that in joining the Association he was bound "by future agreements with the union but not by those in effect at the time (he) joined the Association. . . ." *Leiderman v. Stuart Coat Corp.,* N.Y.L.J., July 22, 1954, p. 2, Coleman, J.

II. THE ARBITRABLE ISSUE

DISPUTE OVER TIME LIMIT FOR DEMANDING ARBITRATION IS ARBITRABLE. This decision of the Appellate Division, digested in Arb. J., 1954, p. 54, was unanimously affirmed. *Local Union 516, Inspection Unit, UAW-CIO v. Bell Aircraft Corp.,* 307 N.Y. 744, 121 N.E. 2d 551 (Court of Appeals, July 14, 1954).

DISPUTE OVER COSTS OF PREVIOUS LITIGATION BETWEEN SHIP OWNER AND CHARTERER IS NOT ARBITRABLE under a contract with an arbitration clause covering "any dispute arising under the charter party." Court held that under the Federal Arbitration Act arbitrators have no power to direct payment of costs in proceeding to secure release from attachment. "That is the function of the judge," said the court, referring to *The Scotland,* 118 U.S. 507. *Theofano Maritime Co., Ltd. v. The Aliakmon,* 122 F. Supp. 853 (Dist. Ct. Maryland, Aug. 13, 1954, Thompson, D. J.).

DISPUTE OVER EMPLOYER'S REPRIMAND FOR ALLEGED UNSATISFACTORY WORK IS ARBITRABLE. Such reprimand was deemed by a court to be "discipline" within the meaning of an arbitration clause which limited the employer's right to discipline and discharge for just cause. The court directed arbitration "to the propriety of the discipline, that is, of the act of discipline, not to the record of it where the official reprimand of the employees had been entered." *Federal Labor Union 23393, AFL v. American Can Co.*, 28 N.J. Super. 306, 100 Atlantic 2d 693 (Super. Ct. of New Jersey, App. Div., Nov. 13, 1953, Francis, J. A. D.).

DISPUTE OVER REFUSAL OF ONE PARTY TO AGREE TO SALE OF REAL ESTATE IS NOT ARBITRABLE UNDER A CONTRACT WHICH EXPRESSLY PROVIDES THAT SUCH SALE MAY BE MADE ONLY BY UNANIMOUS VOTE. Said the court: "The matter of sale of the respective parcels is not within the scope of the arbitration clauses. . . . Under the express provisions of these agreements a sale of realty can be achieved only by unanimous vote of the parties to the agreement. The arbitration clause does not purport to override the explicit rights accorded in the agreement itself, on a matter of policy." *Katz v. Burkin*, 283 App. Div. 1092, 113 N.Y.S. 2d 627 (Second Dept., June 21, 1954).

DISPUTE OVER BUS COMPANY'S RULE THAT DRIVERS SPEND THEIR LAY-OVER TIME AT GARAGE RATHER THAN AT BUS TERMINAL IS ARBITRABLE UNDER BROAD ARBITRATION CLAUSE COVERING INTERPRETATION AND APPLICATION OF CONTRACT. The Washington Supreme Court upheld a lower court in ruling that the matter must be arbitrated since, under the Arbitration Act of the State of Washington as amended in 1947 (Rev. Code sec. 7.04.010), parties to a collective bargaining agreement have the option either to provide specifically for application of the statutory procedure in enforcing the arbitration clause or to "provide for any method and procedure for the settlement of existing or future disputes and controversies." As to the initial controversy, the court said: "Whether Greyhound or the union is right, it is not for us to decide this question. Its decision is a matter for the arbitrators." *Greyhound Corp. (Northwest Greyhound Lines Div.) v. Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1348*, 271 Pacific 2d 689, 22 L.A. 555 (Washington Supreme Court, June 3, 1954, Finley, J.).

DISPUTE OVER USE OF OUTSIDE CONTRACTOR NOT ARBITRABLE UNDER ARBITRATION CLAUSE REFERRING TO VIOLATION OR INTERPRETATION OF CONTRACT TERMS, where contract contained no provision relating to construction of additional facilities. Use by an oil company of outside contractors to perform construction work which could have been done, in part, by the company's union employees was held not arbitrable under the arbitration clause despite the contract definition of grievances which included other disputes arising out of the contract. *Standard Refinery Union v. Esso Standard Oil Co., Inc.*, 23 L.A. 168 (New Jersey Superior Ct. App. Div., Aug. 24, 1954, Leyden, J.).

FAILURE TO PERFORM AGREEMENT SET FORTH IN AN AWARD IS NOT ARBITRABLE. This decision, digested in Arb. J. 1954, p. 50, was affirmed by majority vote. *Goldmar Hotel Corp. v. Morningside Studios, Inc.*, 283 App. Div. 935, 130 N.Y.S. 2d 650 (1st Dept. May 25, 1954).

DISPUTE OVER WHETHER FIVE-DAY WORKWEEK SHOULD BE CONTINUED IN VIEW OF FACT THAT IT RESULTED IN BAD PRODUCTION IS NOT ARBITRABLE under contract clause providing for arbitration of "unforeseen difficulty . . . between both parties." Court held that difficulty over 5-day week is an internal difficulty arising from operation of plant and not a difficulty "between both parties." *Kornblatt v. Int'l Bakery and Confectionery Wkrs. Union, Local 321*, 22 L.A. 647 (Pennsylvania Ct. of Common Pleas, Lucerne County, Dec. 11, 1953, Pinola, J.).

COURT REFUSES TO DIRECT ARBITRATION UNDER TAFT-HARTLEY ACT WHERE ISSUE CONCERNS UNION'S DEMAND FOR REINSTATEMENT OF THREE FIREMEN DISPLACED BY CHANGE IN EQUIPMENT where collective bargaining agreement reserves for employers the right to make changes in methods of production provided it does not result in excessive workloads. Said the court: "Such job eliminations are the normal and expected incidents of the modernization of industrial methods. There is a complete absence of evidence that the discharge of the three firemen was for any reason other than that their services were no longer needed." *Industrial Trades Union of America v. Woonsocket Dyeing Co., Inc.*, 122 F. Supp. 872 (U.S. Distr. Ct. Rhode Island, Aug. 5, 1954, Day, D. J.).

ARBITRATION OF DISPUTE OVER DISCHARGE DIRECTED BY COURT UNDER TAFT-HARTLEY ACT despite procedural defense by employer that union has not complied with time requirements of grievance machinery, since, under Pennsylvania arbitration law, the union's right to prosecute a grievance must be determined by arbitration (*Mack Manufacturing Corp. v. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America*, 368 Pa. 37, 81 Atlantic 2d 562). The court therefore directed the company to proceed to arbitration under the terms of the collective bargaining agreement. *Insurance Agents' International Union, A.F.L. v. Prudential Ins. Co.*, 122 F. Supp. 869 (U.S. Distr. Ct. E.D. Pennsylvania, August 6, 1954, Follmer, D. J.).

DISPUTE BETWEEN PUBLISHER AND UNION OVER INDIVIDUAL DEALERSHIP CONTRACTS ENTERED INTO WITH FORMER EMPLOYEES OF CIRCULATION DEPARTMENT NOT ARBITRABLE where collective bargaining agreement did not deal with or restrict changes in method of circulation and sales. In this case, since the employer had not clearly acknowledged arbitrability during the arbitration proceedings, the award was deemed not binding. This decision of the court was made in an action seeking an injunction to restrain the union from picketing to compel the publisher to terminate contracts with former employees. *Sloan v. Journal Publishing Corp.*, 23 L.A. 302 (Oregon Circuit Ct., Multnomah County, Sept. 24, 1954, Dobson, C. J.).

CLAIM OF DAMAGES FOR VIOLATION OF NO-STRIKE CLAUSE NOT COVERED BY CLAUSE PROVIDING FOR ARBITRATION OF "ALL DIFFERENCES, DISPUTES AND GRIEVANCES . . . WITH RESPECT TO MATTERS COVERED IN THIS AGREEMENT." An action under the Taft-Hartley Act for damages was not stayed pending arbitration under the Federal Arbitration Act since the claim for damages was not arbitrable. Furthermore, the court ruled that in accordance with decisions of the Second, Third and Fourth Circuit Courts, the Federal Arbitration Act does not apply to labor-management disputes (*Shirley-Herman,* the *Pennsylvania Greyhound* and the *Colonial Hardware* cases, 182 F. 2d 806, 192 F. 2d 310, 168 F. 2d 33). In affirming a decision of the District Court of April 27, 1954 (22 L.A. 476), the court did not follow the recent decision in the *Tenney Engineering* case of the Third Circuit (207 F. 2d 450, digested in Arb. J. 1953, p. 200), nor did it decide on specific enforcement of arbitration agreements under the Taft-Hartley Act, but ruled only that the arbitration clause in question "does not cover the matter of damages arising out of violation of the no-strike clause and that the provisions of the United States Arbitration Act may not be relied on to stay proceedings in a suit brought under a collective bargaining agreement entered into by workers engaged in interstate commerce as those here were engaged." *United Electrical, Radio & Machine Workers of America v. Miller Metal Products, Inc.,* 215 F. 2d 221 (U.S. Ct. of App., 4th Cir., August 14, 1954, Parker, C. J.).

DISPUTE OVER SEVERANCE PAY NOT ARBITRABLE DESPITE BROAD ARBITRATION CLAUSE IN COLLECTIVE BARGAINING AGREEMENT WHICH IS "UNAMBIGUOUS" AND WHICH "IN NO WAY CURTAILED" THE RIGHT OF EMPLOYER TO DISCONTINUE BUSINESS. *Lynn Pharmacy, Inc. v. Retail Drug Employees Union, Local 1199,* N.Y.L.J., Sept. 9, 1954, p. 6, Brisach, J.

DISPUTE OVER FAILURE TO PAY CUSTOMARY CHRISTMAS BONUS IS ARBITRABLE UNDER ARBITRATION CLAUSE COVERING GRIEVANCES "IN REGARD TO WAGES, WORKING CONDITIONS AND OTHER MATTERS ARISING OUT OF ENFORCEMENT OF THIS AGREEMENT OR ITS INTERPRETATION" despite fact that Christmas bonus was not mentioned in collective bargaining agreement. Since custom and usage may under some circumstances become part of the written contract, the latter's interpretation is thus involved. Whether the union has waived its right to arbitration by instituting an unfair labor practice proceeding under the National Labor Relations Act and did not follow the grievance procedure set forth in the contract, goes, as the court said, "to the merits of the controversy, and under well established legal principles must be left to the arbitrator for determination." The court further expressly applied the Pennsylvania Arbitration Act of 1927, not considering a collective bargaining agreement "a contract for personal services" within the meaning of the exception clause of sec. 1 of the Act. *International Ladies' Garment Workers' Union, A.F.L. v. Nazareth Mills Company,* 22 L.A. 862 (Pa. Ct. of Common Pleas, Northampton County, January 11, 1954, Barthold, P. J.).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

ARBITRATION AGREEMENT FOR FUTURE DISPUTES IS REVOCABLE IN VERMONT IN ABSENCE OF ARBITRATION STATUTE. A court action against a corporation for breach of an employment contract was not stayed in Vermont on the basis of an arbitration clause. Said the court: "There is no statutory law governing arbitration in Vermont; common law rules must, therefore, necessarily apply. The common law is that an arbitration agreement to submit an issue to arbitration is not binding and is revocable at any time before an award is actually made by the arbitrators." *Bernhardt v. Polygraphic Co. of America, Inc.*, 122 F. Supp. 733 (Dist. Ct., D. Vermont, July 8, 1954, Gibson, D. J.).

ARBITRATION CLAUSE NOT ENFORCEABLE WHERE ONE PARTY IS GIVEN OPTION AS TO ARBITRATION where quality questions were referred to Hatch Textile Research, a commercial laboratory. Arbitration clause which could be invoked by one party only was held not "reciprocally enforceable" and therefore no ground for staying Municipal Court action. *Associated Spinners, Inc. v. Pfeffer*, N.Y.L.J., Sept. 13, 1954, p. 7, Gavagan, J.

ARBITRATION CLAUSES OF COLLECTIVE BARGAINING AGREEMENT MAY BE ENFORCED UNDER SEC. 301 OF TAFT-HARTLEY ACT IN ACTION INITIATED BY UNION BUT NOT WHEN INITIATED BY INDIVIDUAL EMPLOYEES. In this ruling, the court referred to similar conclusions reached in *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137, and *Insurance Agents' International Union v. Prudential Ins. Co.*, 122 F. Supp. 869 (digested in Arb. J. 1953 p. 101 and 1954 p. 213. *Evening Star Newspaper Co. v. Columbia Typographical Union No. 101*, 23 L.A. 262 (U.S. Dist. Ct. D.C. Col., October 6, 1954, Holtzoff, J.).

AWARD CONFIRMED DESPITE FAILURE OF UNION TO INITIATE ARBITRATION THROUGH ITS PRESIDENT OR TREASURER, as required by Sec. 12, General Association Law, for unincorporated associations, where objecting party participated in arbitration proceedings. Validity of award upheld all the more as union vice-president, by affidavit, asserted authorization of arbitration by president and treasurer. A further contention that dispute was within the "exclusive jurisdiction" of NLRB was of no avail in challenging the award "particularly in view of the fact that the contention was first advanced after the completed arbitration." *District 65, Distributive, Processing and Office Workers of America, CIO v. Gerda Footwear Co., Inc.* NYLJ, June 1, 1954, p. 7, Hecht, J.

MOTION FOR DECLARATORY JUDGMENT NOT AVAILABLE WHERE OBJECT IS TO OBTAIN LEGAL ADVICE. The parties, having proceeded to arbitration as provided in their contract, "must be prepared to face the consequences of their choice," all the more so as the courts had already passed upon the validity of the arbitration clause. *Kenway Metals Corp. v. Albert M. Goldstein, Inc.*, NYLJ, Aug. 23, 1954, p. 2, Di Falco, J.

DISCHARGED EMPLOYEE, IN INDIVIDUAL CAPACITY, MAY NOT COMPEL ARBITRATION under a collective bargaining agreement where union has refused to do so, in absence of a showing of wrongful conduct by union. *Parker v. Voges Mfg. Co., Inc. (In Receivership)*, 23 L.A. 174 (U.S. Dist. Ct. E.D.N.Y. Aug. 13, 1954, Bruchhausen, D. J.).

FILING OF CHARGE OF UNFAIR LABOR PRACTICE WITH NLRB OVER DISCHARGE OPERATES AS WAIVER OF RIGHT TO ARBITRATE THAT GRIEVANCE because NLRB, having exclusive jurisdiction, had previously rejected the employee's complaint. *United Steelworkers of America, Local 3775 v. Lennox Furnace Co., Inc.*, 206 Misc. 193 (Sup. Ct. Onondaga County, June 14, 1954, Ringrose, J.).

COURT WILL NOT DIRECT ARBITRATION AT REQUEST OF UNION DURING STRIKE IN VIOLATION OF NO-STRIKE CLAUSE. Said the court: "It would clearly be inequitable and improper for this court to permit this union, on the one hand, to enforce arbitration provisions of this agreement, when, on the other hand, in disregard of the express provisions thereof, it had elected to, and still in a pending suit claims the right to pursue a course of picketing and striking to obtain settlement of disputes." *Stewart Stamping Corp. v. Uprichard*, N.Y.L.J., Oct. 28, 1954, p. 14, Eager, J.

COURT ACTION WILL NOT BE STAYED PENDING ARBITRATION UNDER MINIMUM BASIC RESORT HOTEL AGREEMENT where party requesting stay interposed answers containing substantial counter-claims and took other affirmative steps with respect to examination before trial. When hotel operators, members of the Sullivan County Hotel Association, took such action against an entertainment booking agent, a member of the American Guild of Variety Artists, he was deemed to have waived his right to arbitrate under the agreement. *Mamakating Operating Corp. v. Rapp*, 133 N.Y.S. 2d 184 (Sup. Ct., Sullivan County, N.Y., Sept. 1, 1954, Hamm, J.).

GRIEVANCE WHICH AROSE DURING CONTRACT TERM IS ARBITRABLE AFTER CONTRACT TERMINATION. Whether necessary preliminary steps of the grievance procedure have been complied with is a question to be determined by an arbitrator, not the court (*Myers v. Richfield Oil Corp.*, 98 Cal. App. 2d 667). Furthermore, the court held, the party seeking arbitration need not allege a specific violation of precise terms of the contract in order to obtain a court order directing arbitration (*Krug v. Republic Pictures Corp.*, 120 A.C.A. 630, digested in Arb. J. 1953, p. 202). *Jones, as President of Oil Workers International Union, Local 445 v. Tide Water Associated Oil Co.*, 22 L.A. 562 (California Superior Ct., Contra Costa County, June 10, 1954, Taylor, J.).

IV. THE ARBITRATOR

COURT WILL NOT REMOVE THIRD ARBITRATOR CHOSEN BY PARTY-APPOINTED ARBITRATORS ON ALLEGATION THAT HE HAD NOT ACTED IMPARTIALLY IN A SIMILAR PREVIOUS ARBI-

TRATION INVOLVING OTHER PARTIES. A lower court had refused to remove the third arbitrator for lack of statutory authority, and this refusal was unanimously affirmed by the Supreme Court of Errors of Connecticut. Said the court: "The submission of disputed matters to arbitration will not be encouraged, as it should be, if, during the proceedings and before an award, either party can come into court in a summary proceeding not sanctioned by statute and challenge the qualifications of an arbitrator." The court directed the parties to proceed with arbitration. *Dewart v. Northeastern Gas Transmission Co.*, 101 Atlantic 2d 299 (Supreme Court of Errors of Connecticut, Dec. 1, 1953, Baldwin, A. J.).

COURT DIRECTS ARBITRATION TO PROCEED UNDER COURT-APPOINTED CHAIRMAN WHERE CONFLICTING AFFIDAVITS SEEM TO INDICATE DILATORY CONDUCT BY AN ARBITRATOR. Said the court: "This court will not allow the speedy determination of the controversy to be delayed by reason of the refusal of one arbitrator to proceed where the refusal is predicated upon personal differences arising between arbitrators. Personality conflicts arising between arbitrators will not be permitted to defeat the salutary purpose of arbitration which is encouraged by the courts as a short cut to substantial justice. It may not be amiss in passing to remind the arbitrators that they are judicial officers, bound by the rules that govern such officers and that they act in quasi-judicial capacity. As such, they are not advocates and should approach the case with open minds free from bias. The oath of the arbitrators, faithfully and fairly to hear and examine the matters in controversy and to make a just award according to the best of their understanding, is the rule and guide of their conduct (*American Eagle Fire Insurance Co. v. New Jersey Insurance Co.*, 240 N.Y. 398)." *Richmond Asbestos Co., Inc. v. George C. Fuller Contracting Co., Inc.*, N.Y.L.J., September 22, 1954, p. 12, Oct. 7, 1954, p. 11, Ritchie, J.

FAILURE OF ARBITRATOR TO DISCLOSE HIS FRIENDSHIP WITH AN OFFICER OF A CORPORATION, PARTY TO THE PROCEEDING, DOES NOT CONSTITUTE MISCONDUCT SUCH AS TO VACATE AWARD. Said the court: "There is no proof of any fact indicative of dishonesty or that the facts as proved amount to disloyalty to oath." *Tru-Craft Clothes, Inc. v. Plaza Mills, Inc.*, N.Y.L.J., Oct. 25, 1954, p. 7, Benvenga, J.

DISQUALIFICATION CANNOT BE CLAIMED AGAINST ARBITRATOR WHERE PARTIES SELECTED HIM BY NAME AND WHERE CHALLENGE WAS NOT PRESENTED UNTIL AFTER THE AWARD. Court action was undertaken to disqualify an arbitrator after the award had been rendered, although the parties had selected him by name with full knowledge of his relationship to the industry and professional connections with the attorneys for one of the parties. In confirming the award, the court said: "A person is at liberty to select whom he likes, and (once having made his choice—and certainly when he has proceeded to hearing without complaint) he should in morals, in good faith, and in law be estopped from questioning the competency of the arbitrator of his own choosing." *Nadalen Full Fashion Knitting Mills, Inc. v. Barbizon Knitwear Corp.*, N.Y.L.J., Oct. 18, 1954, p. 8, Levy, J.

MONETARY AWARD CONFIRMED DESPITE FAILURE OF ARBITRATOR TO SHOW COMPUTATION BY WHICH HE REACHED HIS DECISION. The court held that "it is not necessary that the award should show affirmatively the performance of a preliminary step in the determination of the award (*Hiscock v. Harris,* 74 N.Y. 108; *Application of Brenda Modes,* 78 N.Y.S. 2d 36)." *Levenstein v. Milou Hotel Operating Corp.,* Supreme Court, County of St. Lawrence, N. Y., July 19, 1954, Graves, J.

AWARD BASED ON MAJORITY OPINION CONFIRMED DESPITE RESIGNATION OF UNION-APPOINTED ARBITRATOR PRIOR TO DECISION ON ALL ISSUES where collective bargaining agreement contained no provision indicating effect of resignation of arbitrator but did provide for a majority award. An application to vacate the award was denied, the court saying: "The parties bound themselves in the absence of undue means to accept the report of any two arbitrators." *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL v. Connecticut Company,* 23 L.A. 76 (Connecticut Superior Court, New Haven County, March 23, 1954, Conway, J.).

V. ARBITRATION PROCEEDINGS

ARBITRATORS MAY CONSOLIDATE SEVERAL PROCEEDINGS INTO ONE WHERE SEPARATE CONTRACTS ARE BETWEEN DIFFERENT SELLERS AND THE SAME BUYER AND WHERE ALL PROVIDE FOR ARBITRATION BEFORE THE SAME TRIBUNAL, provided "the dispute on each contract be separately heard and the award under each contract separately stated with the final award being made in favor of either party for the difference between the amounts due each on each separate agreement." The court said further that "the manner of hearing and disposal of the issues in each of the proceedings between the petitioner and the common respondent would be a matter for the arbitrators since, by its very nature, this is a procedural matter within their province." *Franc, Strohmenger & Cowan Co., Inc. v. Designs by Stanley, Inc.; Alex H. Gelles Corp. v. Designs by Stanley, Inc.,* N.Y.L.J., Sept. 8, 1954, p. 7, Brisach, J.

AWARD CONFIRMED DESPITE REFUSAL OF ARBITRATORS TO VISIT WAREHOUSE FOR INSPECTION OF MERCHANDISE where hearings were held open to permit parties to submit affidavits as additional evidence and where no challenge was directed to arbitrators' refusal to make inspection at that time. Court denied motion to vacate award "mindful that all reasonable intendments are to be indulged in favor of the arbitrators' award (*Matter of Mencher,* 276 App. Div. 556, 96 N.Y.S. 2d 13)." *Avila Fabrics, Inc. v. Excel Garment Mfg. Co.,* N.Y.L.J., Sept. 28, 1954, p. 5, Gavagan, J.

EXAMINATION BEFORE TRIAL MAY BE CONDUCTED PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE, under a charter party providing for arbitration. *The Shanghai Victory,* 123 F. Supp. 802, 1954 American Maritime Cases 1154 (S.D.N.Y. April 6, 1954, Conger, D. J.).

NEW YORK COURT WILL NOT STAY CHICAGO ARBITRATION PROCEEDINGS NOTWITHSTANDING THE FACT THAT OTHER JURISDICTION CANNOT PROVIDE THE RELIEF SOUGHT FOR IN NEW YORK. An employer raised the question of arbitrability before an arbitrator in Chicago and on receiving an adverse decision, refused to proceed on the merits. A motion in the New York Supreme Court to stay arbitration was denied for lack of jurisdiction, the court saying that the fact that relief cannot be had elsewhere is not "grounds for entertaining an action not otherwise properly here." *Western Union Telegraph Co. v. Commercial Telegraphers' Union, AFL,* 133 N.Y.S. 2d 371 (Sup. Ct., June 21, 1954, Steuer, J.).

VI. THE AWARD

COURT CONFIRMS AWARD AS WITHIN ARBITRATOR'S AUTHORITY WHERE ARBITRATOR FOUND NO JUST CAUSE FOR DISCHARGE OF EPILEPTIC EMPLOYEE. In a submission before the Connecticut State Board of Mediation, an employer and union asked for determination of whether just cause existed for discharge of an epileptic employee. The arbitrator ruled that there was not, and in an accompanying opinion, explained that the employer should have sought to transfer the employee to non-hazardous work. The award was vacated by the Superior Court of New Haven County at Waterbury as exceeding the arbitrator's authority "in overlooking the terms of the contract and attaching conditions as a limitation to the right of management." The court's decision (digested in Arb. J. 1953, p. 212), was reversed by the Supreme Court of Errors of Connecticut, in holding that the written opinion of the arbitrator was "irrelevant" to the propriety of the award, which was found to be within the arbitrator's authority. At the same time, the court denied the union's application to correct the award by including reinstatement and back pay for the aggrieved employee, inasmuch as the submission dealt only with the question of whether just cause for discharge existed and did not ask the arbitrator to award remedies. *American Brass Company v. Torrington Brass Workers Union, Local 423, International Mine Mill and Smelter Workers,* 107 Atlantic 2d 255 (Supreme Court of Errors of Connecticut, Aug. 3, 1954, O'Sullivan, A. J.).

INTEREST FROM DATE OF AWARD TO DATE OF ENTRY OF JUDGMENT MUST BE GRANTED TO SUCCESSFUL PARTY AS MATTER OF RIGHT. (*East India Trading Co., Inc. v. Halari,* 280 App. Div. 420). *Bertram Garden Apts., Inc. v. De Martini,* N.Y.L.J., July 13, 1954, p. 6, Ritchie, J.

ENFORCEMENT OF AWARD UNDER COMMON LAW PERMITTED AFTER FAILURE TO OBTAIN CONFIRMATION WITHIN STATUTORY TIME LIMIT. This decision, digested in Arb. J. 1954, p. 60, was unanimously affirmed. *Jones v. John A. Johnson & Sons, Inc.,* 131 N.Y.S. 2d 362 (2d Dept. June 14, 1954).

COURT WILL NOT REVIEW ARBITRATOR'S DECISION THAT DISCHARGE OF AN EMPLOYEE WAS NOT JUSTIFIED under a contract giving the employer the right to discharge employees for "gross insubordination." The court found that the arbitrator was not obliged to decide the issue in accordance with "legal principles" and that "he had the right to decide that the insubordination was not 'gross' and that it did not justify the employee's discharge even if a court of law would have ruled otherwise." Furthermore, confirmation of the award was not prevented by failure of the employee, who had acecpted a job elsewhere, to apply for reinstatement. *Finn, as President of Local 259, UAW-CIO v. J. J. Hart, Inc.,* 133 N.Y.S. 2d 335 (Sup. Ct. Aug. 4, 1954, Gold, J.).

ENFORCEMENT OF AWARD UNDER COMMON LAW PERMITTED AFTER FAILURE TO OBTAIN CONFIRMATION UNDER ARBITRATION LAW WITHIN TIME LIMIT. This decision, digested in Arb. J. 1954, p. 60, was unanimously affirmed. *Jones v. John A. Johnson & Sons, Inc.,* 22 L.A. 585 (App. Div. 2d Dept., June 14, 1954).

AWARD CONFIRMED DESPITE FACT NO HEARING WAS HELD, where controversy between a union musician and a hotel owner was referred to the International Executive Board of the American Federation of Musicians under the employer's contract with the Federation. The court held that under the circumstances, the special procedures of the Federation were controlling and that "there is no requirement that a hearing must be held before an award is made and the failure to hold one is not in itself ground for refusing confirmation." *Thaler v. Alberman,* N.Y.L.J., Sept. 20, 1954, p. 9, Eder, J.

COURT CONFIRMS AWARD WHILE DENYING MOTION TO REFER ALLEGEDLY UNRESOLVED QUESTIONS BACK TO ARBITRATORS. Dissolution of a partnership and payment of a sum of money was being consummated in accordance with an arbitral award. One party applied to the court after lapse of three months time limit to challenge the award and have certain allegedly unresolved questions arising out of the award determined by the court or the former arbitrators. Application was denied because "such imperfection in the award would be as to matters of substance, which the court cannot correct by amendment. (*Matter of Bond v. Shubert,* 264 App. Div. 484, p. 492 aff'd 290 N.Y. 901)." *Martz v. Martz,* NYLJ, July 15, 1954, p. 4, Morrissey, J.

COMMON LAW RULE THAT COURT WILL NOT REVIEW MERITS OF ARBITRATION AWARD WHICH PARTIES HAVE AGREED TO ACCEPT AS FINAL APPLIES TO DECISIONS OF RAILWAY ADJUSTMENT BOARD. A commercial airline pilot was denied court review of his claim of wrongful discharge after that claim was determined by an adjustment board created under the Railway Labor Act. The court stated the general rule that "a court will not review the merits of a common law arbitration award which the parties have agreed to accept as final." *Bower v. Eastern Airlines, Inc.* 214 F. 2d 623 (U.S. Ct. of App. 3rd Cir., June 21, 1954, Hastie, Cir. J.).

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International Year Book on Civil and Commercial Arbitration, ed. by Nussbaum, pp. 418

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